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ARTICLE

ALLAN KANNER*

Unjust Enrichment in Environmental Litigation

They hang the man and flog the woman
That steal the goose from off the common,
But let the greater villain loose
That steals the common from the goose.
The Law demands that we atone
When we take things we do not own
But leaves the lords and ladies fine
Who take things that are yours and mine.
The poor and wretched don't escape
If they conspire the law to break;
This must be so but they endure
Those who conspire to make the law.
The law locks up the man or woman
Who steals the goose from off the common
And geese will still a common lack
'Till they go and steal it back.

English folk poem, circa 1764

Unjust enrichment, used here in the sense of a restitutionary remedy for tortious misconduct (a disgorgement), should play a larger role in environmental and toxic tort litigation. Its current limited role owes to the fact that contemporary legal education generally ignores equity, resulting in lawyers understanding little about the concept.¹ This is troubling because unjust enrichment

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¹ See PETER BIRKS, UNJUST ENRICHMENT (2003) at 3:

Of the subjects which form the indispensable foundation of private law, unjust enrichment is the only one to have evaded the great rationalization achieved by the writers of textbooks in both England and America since

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is in theory—and could be in practice—a superior remedy in many pollution cases involving private parties generally and public trustees in particular.

The doctrine of unjust enrichment embodies the equitable principle that “a person shall not be allowed to enrich himself unjustly at the expense of another.”² It also rests on another equitable principle that “whatsoever it is certain a man ought to do, that the law supposes him to have promised to do.”³

Unjust enrichment confronts the profitability of pollution. Polluters’ opportunistic behavior is revealed by evidence that states with different enforcement regimes exhibit different rates of pollution, even from the same companies,⁴ indicating that polluters tailor their pollution control efforts to the minimum standards required by each state’s laws.

Unjust enrichment does many things. For example, it shifts the cost of pollution back to polluters who choose to subject their neighbors to pollution, and who often refuse to clean it up quickly. If polluters are forced to pay only the relatively low fair-market value (FMV) of the polluted property, they receive a de facto subsidy to pollute. Unjust enrichment cancels this subsidy.

the middle of the nineteenth century. . . . The consequence is that even at the beginning of the twenty-first century unjust enrichment is still unfamiliar to most common lawyers.

² *St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co. of N. Am.*, 158 A.2d 825, 827 (N.J. 1960); *see also* *Russell-Stanley Corp. v. Plant Indus. Inc.*, 595 A.2d 534, 549 (N.J. Super. Ct. Ch. Div. 1991); *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966).

³ *St. Paul Fire & Marine Ins. Co.*, 158 A.2d at 827-28; *Russell-Stanley Corp.*, 595 A.2d at 549; *Callano*, 219 A.2d at 334. The doctrine of unjust enrichment is often used to impose a quasi-contract or implied contract upon the recipient of an uncompensated benefit. *See* *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994) (stating that unjust enrichment may allow courts to impose equitable liens); *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 285 (N.J. 1992) (recognizing that quasi-contract is appropriate to prevent injustice even where parties’ actions do not manifest contractual intent).

⁴ Pollution also occurs due to a combination of its profitability and the lack of enforcement mechanisms in place to prevent it. Compliance with operational rules (such as permitting, record keeping, and reporting requirements) is well enforced. Other enforcement mechanisms, such as cleanup requirements, are weak. Pollution cleanup, including site remediation and natural-resource damages (NRD), is poorly enforced absent a brownfield development or other economic opportunities. In the case of site remediation, the polluter often oversees the cleanup investigation, planning, and implementation. This encourages spending money (usually on relatively inexpensive studies) to avoid spending substantial sums of money on actual cleanups. If the polluter was faced with appropriate and reliable penalties for any self-dealing, such conduct clearly would be deterred.

More important, unjust enrichment may be available to support communal remedies to harms for which recovery currently is difficult under private or public law approaches.⁵

The novel harms created by pollution sometimes require innovative remedies. Equity, unlike law, is well suited to shaping such remedies. The classic example arises from the exposure of innocent individuals to dangerous pollutants. Although such exposure will inflict real harms upon some people in the future, what is to be done in the near-term for the larger group of exposed individuals? The New Jersey Supreme Court, among others, answered this question by fashioning the equitable remedy of medical monitoring.⁶

In most site-remediation and natural resource damages (NRD) cases,⁷ one of the underlying causes of action will sound in tort. The threshold question, then, is whether the particular jurisdiction allows a restitutionary remedy in tort. Part I addresses this issue. In addition, Part I explores the types of detriments (if any) a plaintiff must suffer before bringing suit, as well as the nature of the defendant's enrichment. In pollution cases, the defendant's enrichment generally is not direct.⁸ It is indirect,⁹ or nega-

⁵ An example of such remedies is medical monitoring, which allows individuals wrongfully exposed to hazardous substances to receive continuing medical testing for possible resultant disease. See, e.g., Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 *TULANE ENV'TL L. J.* 1, 2-3 (1989).

⁶ See, e.g., *id.* at 3.

⁷ Excluded are cases where the plaintiff and defendant may have some pre-existing contractual relation; for example, where the plaintiff leases all or part of his land to the defendant, and the defendant creates pollution. Such special cases may ultimately require little or no differential treatment from what is proposed here, depending on the particular facts of the case. Also excluded are the operational rules dealing with permits, record keeping, and reporting requirements. Such questions are beyond the scope of this article.

⁸ I follow Dawson's distinction on direct and indirect enrichment, as well as his notion that restitutionary relief should not be limited to cases of direct enrichment. JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* 126-27 (1951).

⁹ By indirect, I mean that the plaintiff landowner has suffered some damage to his property by virtue of the pollution. For example, assume *A* dumps \$1 million worth of pollution (i.e., \$1 million is the cost of appropriate offsite disposal) into the subsurface of *B*'s property, which has an FMV of \$100,000. *B*'s damage generally can be: (1) FMV (if the property is uninhabitable or has no FMV due to the stigma), or (2) restitution of the property to the status quo ante. *RESTATEMENT (SECOND) OF TORTS* § 929 (1977). Now assume *B* can still reside on the surface (his pre-pollution use). Leaving aside the difficulty of quantifying *B*'s loss, *A*'s de facto pollution easement is worth more than *A*'s loss absent a restoration measure of damages.

The notions of trespass and easement are used descriptively here. In states where groundwater is part of the public trust, a surface owner with a right of use suffers an

tive, if the plaintiff suffers some lesser loss, or if the defendant's enrichment comes from the savings that results where the defendant uses, but does not otherwise damage, the plaintiff's property.¹⁰ Part II explores the issue of unjust retention by examining the shortcomings of tort remedies as well as the connection between the defendant's enrichment and the wrong suffered by the plaintiff. Part III addresses whether states or Indian tribes acting as public trustees may pursue unjust enrichment remedies in the context of pollution-damage litigation, especially in NRD cases.

I

THE INTERPLAY OF LAW AND EQUITY IN TOXIC TORT LITIGATION

A. Overview

Modern legal and equitable remedies share a dynamic relationship.¹¹ Courts have used both legal and equitable remedies to compensate traditional invasions of land interests.¹² Legal doctrines and equitable causes have evolved to promote the law's policy against gain by unjust enrichment.¹³ Property owners

injury to one aspect of his bundle of property rights. The adjacent pollution also adversely impacts the property in these cases; the polluter, having acted without right, has in effect seized a trespassory pollution easement.

¹⁰ Unjust enrichments involve a saving of resources by the defendant that would have otherwise been lost if not for the nonconsensual retention or use of the plaintiff's property. For example, if a defendant trespasses on a plaintiff's property in order to avoid a toll road, he has been unjustly enriched. While he did not gain money per se, he saved money that he would otherwise have lost. This is an indirect unjust enrichment.

¹¹ See, e.g., DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.1 (1973).

¹² These remedies include, for instance, ejectment, *Wilkerson v. Gibbs*, 405 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1981); *Falejczyk v. Meo*, 176 N.E. 2d 10, 12 (Ill. App. Ct. 1961); *McDonald v. Stone*, 321 S.W. 2d 845, 846, 850-51 (Tenn. Ct. App. 1958)); *Mitchell v. Mitchell*, 1 Md. 55, 58-59 (1851); and damages, *City of Newark v. Eastern Airlines*, 159 F. Supp. 750, 762-63 (D.N.J. 1958); *Edmands v. Olsen*, 9 A.2d 860, 863-64 (R.I. 1939); *Herrin v. Sutherland*, 241 P. 328, 332 (Mont. 1925); *Dougherty v. Stepp*, 18 N.C. 371, 372 (3 Dev. & Bat. 1835); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 13 (5th ed. 1984); THE RESTATEMENT (SECOND) OF TORTS, §§ 158, 929, 951 (1977).

¹³ The law of restitution developed out of the common law action for money had and received (with roots in *assumpsit* and the Roman *quasi ex contractu*). PETER BIRKS, THE FOUNDATIONS OF UNJUST ENRICHMENT 13-16 (2002). Equally important was the groundbreaking work by Scott and Seavey in the American Law Institute's *Restatement of Restitution*. See Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L. Q. REV. 29, 30 (1938). Currently a "schism can be seen to divide the scholars who write on the modern law of restitution" over the "relation between restitution and unjust enrichment." Although a division exists between scholars on

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have at least two approaches for unjust-enrichment restitution claims against a polluter of private property or public natural resources.¹⁴ One approach is legal and provides a restitutionary remedy against a tortfeasor.¹⁵ The other is an equitable cause and secures injunctive relief.¹⁶

While the unjust-enrichment claim is born of equity, it can be both an equitable cause of action (such as for conversion or replevin) and a tort remedy.¹⁷ Equitable claims for restitution address a plaintiff's loss. For private parties, that loss lies in the contamination of their property (for which they assume risk as owners of polluted property), whereas tribes or governmental entities lose the use of unpolluted natural resources. A defendant's enrichment, on the other hand, is related, but not necessarily equivalent, to the plaintiff's loss. In pollution cases, for example, the defendant's gain is the money saved by avoiding waste disposal and cleanup costs that, had they been incurred,

whether restitution proceeds only from unjust enrichment or whether there is "restitution for wrongs, restitution for unjust enrichment, and restitution in vindication of property rights, the majority view follows the latter view." PETER BIRKS, *UNJUST ENRICHMENT AND WRONGFUL ENRICHMENT* 2 (2001).

¹⁴ One could argue at least three. As Professor Graham Virgo states in *THE PRINCIPLES OF THE LAW OF RESTITUTION* (1999), there is restitution for torts, restitution for unjust enrichment, and restitution in proprietary rights cases; *accord* Douglas Laycock, *The Scope and Significance of Restitution*, 67 *TEX. L. REV.* 1277 (1989).

¹⁵ A tortfeasor may be held liable for a restitutionary remedy; *see, e.g.*, KEETON ET AL., *supra* note 12, § 94, at 673. Most states follow this approach.

¹⁶ In *Warren v. Century Bankcorporation*, 741 P.2d 846, 852 (Okla. 1987), the court explained:

The object of restitution is to put the parties back into the position in which they were before the tainted transaction occurred. *Restitution can be had by harnessing either doctrines that have their origin in the common law or those which spring from the equity side of our jurisprudence.* The unifying theme of various restitutionary tools is the prevention of unjust enrichment It starts with the general principle that restitution will be available whenever one has received a benefit to which another is justly entitled. The inequity of retaining a benefit can spring from a variety of sources, such as fraud or other unconscionable conduct in which the recipient has received a benefit for which he has not responded with a quid pro quo. *The remedy in restitution rests on the ancient principles of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to "disgorge" his gains. Disgorgement is designed to deprive the wrongdoer of all gains flowing from the wrong rather than to compensate the victim of the fraud.* In modern legal usage the term has frequently been extended to include a dimension of deterrence. Disgorgement is said to occur when a "defendant is made to 'cough up' what he got, neither more nor less." (internal citations omitted) (emphasis added).

¹⁷ *See, e.g., id.* at 852 n.19.

would have prevented contamination of the plaintiff's property in the first place.

The use of restitutionary damages for pollution torts adversely affecting another's property is well established in the law. The clear rule on unjust enrichment, for example, is that a person "who has been unjustly enriched at the expense of another is required to make restitution to the other."¹⁸ The plaintiff must "show both that defendant received a benefit and that retention of that benefit without payment would be unjust."¹⁹ However, to the extent the phrase "a person shall not be allowed to enrich himself unjustly at the expense of another" means enrichment in fact regardless of a physical transfer,²⁰ a different, equitable, approach is being used.

Restitutionary damages arising in tort for unjust enrichment redress the harm to the plaintiff (here, by trespass and nuisance) that resulted in the defendant's enrichment.²¹ Pollution infringes upon property rights and lowers property values.²² The defendant, however, also benefits by avoiding disposal, subsequent investigation, and cleanup costs. By "storing" hazardous waste on or under another's property, the polluter benefits in that the pollution scenario is less expensive than alternatives, such as sending the waste to a properly permitted landfill. Thus, unjust enrichment, through the equitable remedy of implied contract, also al-

¹⁸ RESTATEMENT OF RESTITUTION § 1 (1936).

¹⁹ VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 526 (N.J. 1994).

²⁰ As noted above, unjust enrichment can be direct or indirect. Indirect unjust enrichment, sometimes called "negative" unjust enrichment, occurs where, for example, a defendant saves expenses by tortiously using plaintiff's property. See *Cross v. Berg Lumber Co.*, 7 P.3d 922, 936 (Wyo. 2000) ("A benefit is conferred upon the defendant where, by tortiously using the plaintiff's property, he saves expense or loss that might otherwise be incurred (benefit being any form of advantage). Thus, to measure negative unjust enrichment or recoverable profit, courts may consider saving of expense.") (citing *Tilghman v. Proctor*, 125 U.S. 136, 146 (1888)); see also *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35 (W.D. Okla. 1991) ("Unjust enrichment can occur when a defendant uses something belonging to the Plaintiff in such a way as to effectuate some kind of savings which results in or amounts to a business profit.") (citing *DOBBS*, *supra* note 11, § 4.5, at 278).

²¹ Sometimes the victim of a wrong can claim a restitutionary remedy on both equitable and legal grounds. For example, if a wrongdoer comes onto one's property and takes one's money without consent, the wrongdoer is liable for both the tort of trespass and, independently, the unjust enrichment which consists in what was taken.

²² The tort system attempts to accomplish the goals of compensation, allocation of cost, and deterrence. See Diane P. Wood, *Commentary on the Futures Problem*, 148 U. PA. L. REV. 1933 (2000).

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lows recovery of the benefit conferred upon the defendant by virtue of his tortious use of the plaintiff's land.²³ The legal fiction of an implied contract provides the plaintiff with an opportunity to benefit from the defendant's use of his land. Even if the parties never had a contact with one another or met any of the general requirements for creation of a contract, a court may find an implied contract where it finds the defendant's profit off the plaintiff's land to be unjust.²⁴

Because tort law recognizes alternate remedies, some plaintiffs are entitled to "waive the tort" and recover the wrongdoer's gain.²⁵ Consider the wrongful invasion of property rights. Unjust enrichment occurs when a defendant uses something belonging to the plaintiff in such a way as to effectuate some kind of savings, resulting in a business profit.²⁶ Prosser explains that, under this approach to unjust enrichment, the restitution is an alternative to tort liability, and unsuccessful pursuit of the implied-contract theory will not bar a later action for the restitutionary remedy under tort itself.²⁷ The implied-contract doctrine also applies in cases where there has been outright occupation and use by a trespasser, like the case of a polluter taking a pollution easement without consent:

²³ See Laycock, *supra* note 14, at 1280; see also JAMES FISCHER, UNDERSTANDING REMEDIES 303 (1999) ("The essence of unjust enrichment and its correlative remedy of restitution is the recovery of the benefit realized by the defendant not the harm or injury sustained by the plaintiff."); accord Laycock, *supra* note 14, at 1282-83.

²⁴ See *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 388 (Fla. Dist. Ct. App. 1997). In the case of pollution, this raises the issue of how to measure the plaintiff's value in not having the land polluted by the defendant.

²⁵ The invasion of one's property by pollution allows suit *in tort* for either the FMV of the property or the diminution in FMV (the costs of restoring one's land to its pre-injury condition) even if those costs far exceed the amount by which the land's value has been diminished (at least where repair is possible and likely to be carried out). See, e.g., *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991); *Roman Catholic Church v. La. Gas Serv. Co.*, 618 So. 2d 874 (La. 1993); RESTATEMENT (SECOND) TORTS § 929(1)(a) (1977). The use-and-enjoyment interest in land might be invaded both by trespass and nuisance. Again, the measure of damages may be diminution in market value or cost of repair or abatement. See Allan Kanner & Tibor Nagy, *Measuring Loss of Use Damages in Natural Resource Damage Actions*, 30 COLUM. J. ENVT. L. 417 (2005).

²⁶ *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35 (W.D. Okla. 1991) (citing DOBBS, *supra* note 11, § 4.5, at 278).

²⁷ KEETON ET AL., *supra* note 12, § 94, at 672-73; accord, *Barboudi v. Lysandrou*, 559 So. 2d 648, 650 (Fla. Dist. Ct. App. 1990) (citing Keeton with approval). The difference between implied contracts based upon tort and those based upon contract was discussed in *Branch v. Mobil Oil Corp.*, 788 F. Supp. 539 (W.D. Okla. 1992).

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[T]here has developed the doctrine that where the commission of a tort results in the unjust enrichment of the defendant at the plaintiff's expense, the plaintiff may disregard, or "waive" the tort action, and sue instead on a theoretical and fictitious contract of restitution of the benefits which the defendant has so received. "Waiver" of the tort is an unfortunate term, since the quasi-contract action itself is still based on the tort, and there is merely an election between alternative, co-existing remedies, and the unsuccessful pursuit of the "implied" contract will not bar a later action for the tort itself.²⁸

Particularly victimized by pollution are the poor and underprivileged classes of our society. Native Americans and other racial minorities have suffered what has become known as environmental racism.²⁹ A high percentage of Native Americans and African Americans live near toxic and solid-waste dumps.³⁰ Polluters' attraction to these communities compounds the societal inequities they already suffer. Because these minorities are less likely to be educated social activists, and thus, unlikely to contest the dumping, polluters see them as a good target for their dumping.³¹ Native American tribes seeking to improve their economic situations have not been in strong positions to question polluters' offers and, once agreements are made, they have not been in a good position to later challenge polluters for their environmental rights.³²

²⁸ KEETON ET AL., *supra* note 12; *accord*, *Barbouthi*, 559 So. 2d at 650 (citing Keeton with approval); *see also* VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 526 (N.J. 1994) (stating that unjust enrichment may allow a court to impose an equitable lien); *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 285 (recognizing that quasi-contract is appropriate to prevent injustice even where parties' actions do not manifest contractual intent). The *Restatement of Restitution* also notes the doctrine's extension to cases where a corporation employs eminent domain to take possession of land without using the statutory procedure, where valuable soil has been removed, or where cattle have been grazing upon the land, irrespective of any damage done to it.

²⁹ Linda D. Blank, *Seeking Solutions to Environmental Inequity: The Environmental Justice Act*, 24 ENVTL. L. 1109, 1136 (1994).

³⁰ *Id.* at 1110-12; Allan Kanner et al., *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 DUKE ENVTL. L. & POL'Y F. 155, 156 (2003); Allan Kanner, *Tribal Sovereignty and Natural Resource Damages*, 25 PUB. LAND & RESOURCES L. REV. 93 (2004).

³¹ Allan Kanner, *Equity in Toxic Tort Litigation: Unjust Enrichment and the Poor*, 26 L. & POL'Y 209, 217 (2004).

³² Kanner, *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, *supra* note 30, at 157.

B. The Restitutionary Award in Tort

The focus here will be on the use of restitutionary damages for pollution torts adversely affecting one's property. Given the proper circumstances, restitution is available in contract, tort, and other actions in law or equity.³³ With respect to tort, compensatory damages are those "awarded to a person as compensation, indemnity, or restitution for harm sustained by him."³⁴ While different, these three are all accepted tort remedies.³⁵

Restitution generally restores either the thing gained by the taking or the thing taken or lost, including the value of the use of the thing taken during the period of misappropriation. If, for example, I steal a camera you acquired for \$50 and then sell it for \$100, your restitution (e.g., by an action for constructive trust or for accounting of profit) is \$100 (the money gained from the property wrongfully taken). Since the plaintiff's property was used to produce the money, that money can be thought of as a new form of the plaintiff's property.

In property pollution cases, plaintiffs can seek damages in one of the two ways: (1) by making the defendant pay restoration plus fair-rental value during the de facto taking period (from the onset of pollution to its cleanup),³⁶ or (2) by making the defendant pay substitutionary restitution (i.e., making the tortfeasor restore what has been substituted for the damaged property in the form of money).³⁷ In many cases, restoration is expensive

³³ See 22 AM. JUR. 2D *Damages* § 34 (1988); RESTATEMENT OF RESTITUTION, §§ 150-54 (1936); GEORGE E. PALMER, *THE LAW OF RESTITUTION*, § 1.1 at 2 (1978). Restitution is also the remedy in actions for replevin or ejectment.

³⁴ RESTATEMENT (SECOND) OF TORTS § 903 (1977). Tort damages may be compensatory as well as nominal or punitive. DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* 347 (2d ed. 1998).

³⁵ Under conventional wisdom, restitution is defined as, "a common law remedy by which the court can, in its discretion, restore the injured party to a previous position, return something to the rightful owner, or restore the status quo." The definition goes on to say, "[i]n torts, restitution is used to prevent unjust enrichment at the expense of others." GILBERT'S POCKET SIZE LAW DICTIONARY 290 (1st ed. 1997).

³⁶ See, e.g., *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991); *Ward v. Chevallier Ranch Co.*, 354 P.2d 1031 (Mont. 1960) (granting restoration damages if pollution can be cleaned).

³⁷ This supposes the land can be cleaned. An older line of cases suggests that with permanent pollution-damages, the tort recovery should be diminution in property value. However, these cases do not often consider the unjust-enrichment principle, and predate concerns about the neighboring landowner's own pollution liabilities and social concerns about eliminating uncontrolled pollution from the environment. What often animates these decisions is trepidation regarding the enormity of the restoration or cleanup costs or their lack of proportionality to the underlying wrong.

and exceeds both the FMV of the property and the amount of the tortfeasor's unjust enrichment.³⁸ Under similar circumstances, tort law regularly embraces pragmatic and equitable remedies. Medical-monitoring tort remedies are an example.³⁹ Notable, except in implied and quasi-contract cases, is the superficial uncertainty around designating medical monitoring a cause of action as opposed to a remedy.⁴⁰ The better analysis treats it as a restitutionary remedy.⁴¹ Unlike a legal remedy for past harm, equitable relief is used to avoid future harm. Medical-surveillance relief is an equitable goal mitigating future harm.

The unjust-enrichment principle avoids this. Subject to an exception allowing for disproportionate restoration costs to protect personal values, the *Restatement of Torts* takes the position that replacement is a suitable measure, unless this is wholly disproportionate to the land value. RESTATEMENT OF TORTS § 929, cmt. b (1939).

³⁸ Under Florida law, a suit for wrongful injury to property by a private landowner will only allow for damages amounting to the actual diminution of value to the property. This achieves the goal of not overcompensating the plaintiffs in these claims. *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1317-18 (N.D. Fla. 2001). However, there is a limited public policy exception to the rule. *Davey Compressor Co. v. City of Delray Beach*, 639 So. 2d 595, 597 (Fla. 1994) (damage to the property resulted in impairment of public drinking water supply and compensation to the city exceeded the property value).

³⁹ About fifteen years ago, the New Jersey Supreme Court decided the seminal case on medical-surveillance relief, *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987). *Ayers* established that medical surveillance should facilitate early diagnosis and treatment of disease and deter polluters who may otherwise avoid liability for injuries resulting years after exposure. The court eliminated the need for proof of current injury, stating an "application of tort law that allows post injury, pre-symptom recovery" is entirely appropriate in the unique and complex area of toxic tort litigation. *Id.* at 311. *Ayers* also made a careful distinction between a claim for enhanced risk of future harm and medical surveillance. An enhanced-risk claim seeks recovery for an unquantified injury that may or may not occur in the future. A medical-surveillance claim, by contrast, seeks recovery for the cost of periodic medical examinations a plaintiff would not have to undergo absent an exposure to toxic chemicals, according to *Ayers*. *Id.* at 312-13. Since then, claims for medical surveillance have been asserted with increasing frequency.

⁴⁰ Many related issues are still in flux, as noted by Samuel Goldblatt and Laurie Styka Bloom, *A Primer on Medical Monitoring*, Products Liability: ALI ABA Course of Study 247, 249 (2001), discussing whether a medical-surveillance claim is an independent cause of action, and is appropriate for treatment as a class action.

⁴¹ In New Jersey, courts appear to treat medical surveillance as an element of damages. For example, in *Coffman v. Keene Corp.*, 628 A.2d 710 (N.J. 1993), the court recognized medical-surveillance damages for breach of duty to warn. In *Fayer v. Keene Corp.*, 709 A.2d 808 (N.J. Super. Ct. App. Div. 1998), the court allowed medical-surveillance damages in a products liability suit. *Ayers* specifically referred to medical surveillance as a "compensable item of damages" rather than a cause of action. *Ayers*, 525 A.2d at 312. Had the courts sought to create a new cause of action in tort for medical surveillance, they would most likely have made that desire clear, given that the *Ayers* court spent considerable energy rejecting "plaintiffs' cause of action" for the enhanced risk of disease. *Id.* at 307-08.

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Many contend that the best case regarding the current interplay between law and equity in toxic tort litigation is *Ayers v. Jackson Township*.⁴² The court recognized that the outer limits of liability are not defined by old common-law strictures.⁴³ In *Ayers*, pollution entered neighboring drinking wells, causing an unreasonable (but otherwise unquantifiable) risk of future personal injury.⁴⁴ Rather than allowing a speculative tort remedy for the increased risk, the court charged the polluter with the reasonable cost of a medical-monitoring program to mitigate or avoid future physical harms to the plaintiffs.⁴⁵ *Ayers* applied a restitutionary remedy in a strict-liability context. Although earlier cases had awarded medical monitoring, *Ayers* articulated the equitable nature of this relief while refusing to label the cause of action equitable. The most important part of the *Ayers* legacy is

⁴² 525 A.2d at 287.

⁴³ By way of background, the analysis undertaken by the New Jersey Supreme Court in *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1114-1116 (N.J. 1993) albeit a premises liability case, is very helpful here:

Because public policy and social values evolve over time, so does the common law. "The power of growth is inherent in the common law." For that reason, the common law cannot be immutable or inflexible. "One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court." . . . [I]n a case such as this in which the legal relationships are not precisely defined, the attempt to pigeonhole the parties within the traditional categories of the common law is both strained and awkward. Moreover, to analogize the status of the parties to the common law classifications holds no great comfort that the analysis will center on factors that will lead to a sound principle of tort liability. In determining premises liability "the common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty." . . . [R]esort to the common law methodology with its insistence on traditional classifications in this setting is not especially instructive and does not necessarily provide reliable guidance in determining the existence and scope of the duty of care that should be ascribed to a broker Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.

(citations omitted).

⁴⁴ 525 A.2d at 291.

⁴⁵ *Id.* at 315.

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that the value of the restitutionary remedy need not equal the value of the tortfeasor's benefit.

Substitutionary restoration, as opposed to specific restoration,⁴⁶ provides financial compensation to the pollution victim. A substitutionary restitution, however, is not often a desirable or fair remedy. In some cases, as the example of the stolen camera shows, the plaintiff gets more than he actually paid in the first place.⁴⁷ However, through use of substitutionary restoration, the law succeeds in deterring the wrongdoer by preventing profit from wrongdoing. Traditional damages focus only on the plaintiff's loss, whereas restitution aims at disgorging benefits from the defendant that would be unjust for him to keep.⁴⁸ The plaintiff's windfall recovery in the camera hypothetical is acceptable because it prevents the defendant's unjust enrichment. This deterrence is not punitive as it imposes no liability on the defendant beyond the gain from the wrong.

In pollution cases, the defendant is taking a de facto pollution easement for private gain, and thus is receiving a benefit without compensating anyone. In *Branch v. Mobil Oil Corp.*, for example, the defendants used others' property as a de facto waste disposal site without prior consent or payment for that privilege.⁴⁹ The court held that unjust enrichment, and the predicate of unjust benefit, occurred in the context of pollution:

Unjust enrichment can occur when a defendant uses something belonging to the Plaintiff in such a way as to effectuate some kind of savings which results in or amounts to a business profit. . . . Defendant[s] used Plaintiffs' property to dispose of pollutants and saved the expenses of otherwise collecting and disposing of same.⁵⁰

⁴⁶ Courts occasionally speak the language of specific restoration (e.g., constructive trust), even though there is no res or property to which a trust might attach. In these cases, the doctrine of unjust enrichment is really being used to effect a substitutionary restitution. See, e.g., *Jersey City v. Hague*, 115 A.2d 8 (N.J. 1955).

⁴⁷ See, e.g., *Janigan v. Taylor*, 344 F.2d 781 (1st Cir. 1965) (stolen securities).

⁴⁸ Medical monitoring is a different sort of restitutionary remedy. Such surveillance is compensation for diagnostic tests to detect latent injuries when the plaintiff has an enhanced risk of injury due to a defendant's tortious conduct. The claim departs from traditional common law tort principles because a present physical injury generally is not required for entitlement to the claim. *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 849-50 (3d Cir. 1990).

⁴⁹ 778 F. Supp. 35 (W.D. Okla. 1991).

⁵⁰ *Id.* at 35-36; see also, *Tilghman v. Proctor*, 125 U.S. 136, 146 (1888).

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Both state and federal constitutional law bars the taking of property without showing public necessity and a prior payment of just compensation. The unilateral seizure of a pollution easement would appear to be a taking of property. Unjust-enrichment remedies impose a quasi-contract or implied contract upon the recipient of this type of uncompensated benefit.⁵¹ This equitable solution is necessary because there is no actual negotiation and agreement between polluter and pollutee prior to the polluter's unjust taking or use of the pollutee's land.

Unjust enrichment rests on the equitable principle that "whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do."⁵² Whether the enrichment is unjust turns on whether "the defendant has received benefits that in equity and good conscience it ought not to keep."⁵³ Here, the benefit to defendant is the money saved by imposing an externality on the plaintiff, for example, by avoiding the cost of a pollution easement.

The "polluter pays" concept works well with unjust-enrichment principles to discipline recalcitrant polluters and reestablishes parity among competitors. The unjust-enrichment measure of damages provides the same incentives as a Pigouvian tax: if a polluter knows that he will be held liable for the greater of either the damages or the illicit profits his activities create, then he will have the proper incentive in the future to avoid such damages or profits. At the same time, unjust enrichment plays—and has played—an important role in protecting property rights.⁵⁴

⁵¹ At common law, the reasonable use doctrine governed the use of resources, such as groundwater, that were shared by neighbors. See 61C AM. JUR. 2D *Pollution Control* § 1987 (1999). Avoidable pollution is not a reasonable use. See, e.g., *Miller v. Cudahy Co.*, 592 F.Supp. 976, 1004 (D. Kan. 1984).

⁵² *St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co.*, 158 A.2d 825, 827-28 (N.J. 1960); *Russell-Stanley Corp. v. Plant Indus. Inc.*, 595 A.2d 534, 549 (N.J. Super. Ct. Ch. Div. 1991); *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966).

⁵³ R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 115 (1986); see also 66 AM. JUR. 2D *Restitution and Implied Contracts* § 3 (1973) (right of recovery is essentially equitable).

⁵⁴ *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35, 36 (W.D. Okla. 1991) (citing DOBBS, *supra* note 11, § 4.5, at 273).

C. *Historical Background*

The restitutionary remedy emerged from both law and equity.⁵⁵ The common-law action for assumpsit led to an implied assumpsit or quasi-contract action, an early form of restitution. At the same time, equity developed many remedies to secure restitution, such as constructive trusts, accounting for profits, equitable liens, and subrogation. Over time, notwithstanding occasional erroneous application of formalistic exceptions and technicalities, these strands came together, and the law moved from a series of discrete cubbyholes to a general restitutionary or unjust-enrichment principle.⁵⁶

An example of formalistic error is the outdated idea that, absent a landlord/tenant relationship, there can be no restitution “in assumpsit” for mere use and occupation of land.⁵⁷ An initial distinction was drawn between a trespasser gaining tangible property during a trespass and one who did not. In the former case, the reasonable value of that tangible property (plus interest) during time of use generally was recoverable: (1) under a conversion theory,⁵⁸ (2) by waiving the tort and suing in assumpsit,⁵⁹ or (3) under a theory of preventing unjust enrichment.⁶⁰ This rule eventually expanded to allow recovery for nonconsensual use of another’s land, even absent the removal of tangible goods, where the trespasser has profited or saved expenses.⁶¹ The reasons for going beyond mere trespass or ejectment remedies to the broader unjust-enrichment principle can be traced to both procedural reforms abolishing the limitations on implied-

⁵⁵ DOBBS, *supra* note 11, § 4.2, at 229.

⁵⁶ See RESTATEMENT OF RESTITUTION § 1 (1937).

⁵⁷ See, e.g., *Hurley v. Lameraux*, 12 N.W. 447 (1882); A.M. Swarthout, Annotation, *Implied Contract in Case of Trespass Upon Real Property*, 167 A.L.R. 796 (2004). Obviously, a remedy for trespass (damages, usually rental value) or ejectment (a legal remedy, albeit one for specific relief) existed.

⁵⁸ See, e.g., *Newhart v. Pierce*, 62 Cal. Rptr. 553 (Cal. Dist. Ct. App. 1967); *Klein v. Newburger, Loeb & Co.*, 151 So. 2d 879, 880 (Fla. Dist. Ct. App. 1963) (dictum). Even if the item converted was worthless, nominal damages were allowed. E.g., *Winkler v. Hartford Accident & Indem. Co.*, 168 A.2d 418, 422 (N.J. Super. Ct. App. Div. 1961). This line of cases is different than if the property has fluctuating value. E.g., *Klein*, 151 So. 2d at 879.

⁵⁹ Here, the notion of waiver was based on the legal fiction that the sale was made with consent on the victim’s behalf. E.g., *Lamine v. Dorrell*, 92 Eng. Rep. 303, 304 (K.B. 1705); *Miller v. Miller*, 24 Mass. (7 Pick.) 133, 135-36 (1828).

⁶⁰ See, e.g., *Franks v. Lockwood*, 150 A.2d 215, 218 (Conn. 1959).

⁶¹ See, e.g., *Edwards v. Lee’s Adm’r.*, 96 S.W.2d 1028, 1031 (Ky. Ct. App. 1936); *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 235 (Va. 1946).

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assumpsit actions and a substantive desire to transcend the limitations of transitional legal fictions. Today, the unjust-enrichment principle applies in all land cases.⁶²

Restitutionary awards may be appropriate, regardless of whether the defendant physically denudes the property (e.g., of trees or topsoil) or simply uses it without consent. In use cases, monetary damages are often the reasonable rental value of the property.⁶³ This is generally the only value taken; thus, recourse to unjust enrichment is not necessary in most non-causal use cases. Where, however, a benefit inures to the tortfeasor in an amount greater than the rental value, courts allow suits for those higher profits in order to prevent unjust enrichment.⁶⁴ This value is sometimes difficult to calculate. *Felder v. Reeth* addresses damages for restitution where there is no market to assess the property value at the time the property was used.⁶⁵ Under such circumstances, the value is determined using the nearest market, plus interest from the date of taking.⁶⁶ Moreover, without a market for such rentals (here, pollution easements), the defendant's profits may be the only measure of reasonable rental value.⁶⁷ Even where the defendant's value or benefit is too difficult to prove, a plaintiff generally may recover as if he had entered into a contract.⁶⁸ The test asks: for what would the parties have contracted at the relationship's inception if both sides were fully informed?⁶⁹ The answer clearly is up to \$1.00 less than the actual benefit of the polluting activity, assuming there are no other transaction costs. Whether the victim would have consented to that amount is not clear. However, the

⁶² However, as discussed *infra*, there still may be reasonable debates about what constitutes an enrichment, how to measure it, and whether its retention is unjust. Suffice it to say that, in many cases, a rental value akin to trespass damages may satisfy the felt intuitions about justice animating the unjust-enrichment principle.

⁶³ E.g., *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35 (W.D. Okla. 1991).

⁶⁴ *Edwards*, 96 S.W. 2d at 1031.

⁶⁵ *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929).

⁶⁶ *Id.* at 748.

⁶⁷ See generally, *Capital Garage Co. v. Powell*, 127 A. 375 (Vt. 1925) (finding that, where rental value of property taken does not fully compensate plaintiff, profits may also be recovered such that gains prevented as well as losses sustained are awarded to plaintiff). For further discussion regarding valuation, see Allan Kanner & Tibor Nagy, *Measuring Loss of Use Damages in Natural Resource Damage Actions*, 30 COLUM. J. ENV'T. L. 417 (2005).

⁶⁸ *Campbell v. TVA*, 421 F.2d 293, 296 (5th Cir. 1969)(citing George P. Costigan, *Implied-in-Fact Contracts*, 33 HARV. L. REV. 376, 387 (1920)).

⁶⁹ See *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 593-94 (5th Cir. 1957).

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jury generally will decide this matter based on the evidence presented. This analysis brings aspects of quasi-contract to the tort analysis.

To recover under the doctrine of unjust enrichment, the plaintiff must “show both that defendant received a benefit and that retention of that benefit without payment would be unjust.”⁷⁰ As explained by the court in *VRG Corp. v. GKN Realty Corp.*, however, the doctrine also “requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.”⁷¹ Explained another way, in successfully applying the doctrine of unjust enrichment, “a common thread . . . [is] that the plaintiff expected remuneration from the defendant, *or if the true facts were known to plaintiff*, he would have expected remuneration from the defendant, at the time the benefit was conferred.”⁷²

Courts historically have recognized that continuous trespasses render available remedies at law inadequate, thus permitting the use of the doctrine of unjust enrichment. As observed by the court in *Rayhertz Amusement Corp. v. Fulton Improvement Co.*:

Equity’s jurisdiction to enjoin continuous trespass is well established. Courts of law are not by reason of the nature of their processes able to give complete and adequate relief through actions at law for trespass. Complainant is entitled to the enjoyment of the demised premises in the position in which it was before the defendants encroached upon it, and to quiet and peaceful possession thereof.⁷³

⁷⁰ *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994).

⁷¹ *Id.*

⁷² *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334-35 (N.J. Super. Ct. App. Div. 1966) (emphasis added); *see also* *Assoc. Commercial Corp. v. Wallia*, 511 A.2d 709, 716-17 (N.J. Super. Ct. App. Div. 1986) (recognizing that remuneration expectation may be constructively satisfied).

⁷³ 200 A. 557, 560 (N.J. Ch. 1938) (internal citations omitted); *see also* *Bellemead Dev. Corp. v. Schneider*, 472 A.2d 170, 178 (N.J. Super. Ct. Ch. Div. 1983) (stating that courts have “the power and duty to issue an injunction where a continuing trespass is threatened”), *aff’d*, 483 A.2d 830 (N.J. Super. Ct. App. Div. 1984); *Jersey City Med. Ctr. v. Halstead*, 404 A.2d 44, 45 (N.J. Super. Ct. Ch. Div. 1979) (“Equity will in proper cases enjoin a continuing trespass or series of trespasses if an action for damages would provide an inadequate remedy.”); *Capone v. Ranzulli*, 134 A. 553, 553 (N.J. Ch. 1926) (“Equity will enjoin continuous trespass, where the injury is irreparable.”); *Quality Excelsior Coal Co. v. Reeves*, 177 S.W.2d 728, 732-33 (Ark. 1944) (recognizing that defendant’s continuous trespasses onto plaintiff’s land rendered plaintiff’s remedy at law inadequate and finding that equity had jurisdiction to issue injunction against defendant’s actions).

Moreover, in *Kruvant v. 12-22 Woodland Ave. Corp.*, the court implicitly utilized an implied contract theory to prevent unjust enrichment.⁷⁴ In that case, an adjoining landowner sued a riding club for the impermissible use of his land for a bridle trail and dressage field.⁷⁵ Although the court determined that the club did not have a prescriptive easement for the dressage field, it held that the plaintiff was not entitled to damages for the multiple trespasses by the club's members because he failed to show any actual damage to the land.⁷⁶ However, because the landowner bore the costs of maintaining the land (e.g., taxes), the court concluded "that where a person uses the land of another to carry on profit-making activities, without permission, the landowner should be able to recover a reasonable rent."⁷⁷ Thus, the court held, albeit implicitly, that the club had been unjustly enriched by its use of the plaintiff's land because it had not paid any of the expenses associated with that land.

At least one court in New Jersey has also recognized that an implied contract is available to recover the costs of abatement in environmental pollution matters and to prevent unjust enrichment. In *Russell-Stanley Corp. v. Plant Industries Inc.*, tenants sought to recover the costs of remediation against the landlord for contamination caused by a prior tenant.⁷⁸ The landlord sought to dismiss the tenants' claim for unjust enrichment because: 1) the landlord was unaware of any contamination until after the tenant took possession of the property; 2) there was privity of contract between the landlord and tenant; and 3) the tenant had voluntarily agreed to clean up the site.⁷⁹ At the outset, the court rejected the landlord's contentions. It found that privity did not prevent recovery based upon unjust enrichment because any contract between the parties did encompass the scope of the pollution on the property.⁸⁰ Implicitly relying on equitable principles, the court also determined that "it does not seem just to deem compliance with an [Environmental Cleanup

⁷⁴ See 350 A.2d 102, 115 (N.J. Super. Ct. Law Div. 1975), *aff'd*, 376 A.2d 188 (N.J. Super. Ct. App. Div. 1977).

⁷⁵ *Id.* at 104-05.

⁷⁶ *Id.* at 114.

⁷⁷ *Id.* at 115; *see also* *Mandia v. Applegate*, 708 A.2d 1211, 1217 (N.J. Super. Ct. App. Div. 1998) (recognizing the reasonable rental rule announced in *Kruvant*).

⁷⁸ *Russell-Stanley Corp. v. Plant Indus. Inc.*, 595 A.2d 534, 536 (N.J. Super. Ct. Ch. Div. 1991).

⁷⁹ *Id.* at 550.

⁸⁰ *Id.*

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and Responsibility Act] based cleanup plan, entered into under the auspices of a state administrative agency, to be the same as a voluntary agreement amongst parties.”⁸¹ With regard to the actual elements of unjust enrichment, it found that the landlord benefited from the cleanup, but held that there was still a genuine issue of material fact as to whether the landlord’s failure to pay for the cleanup costs was unjust.⁸²

Disgorgement of profits is also an accepted approach in equity to prevent unjust enrichment.⁸³ In various contexts, courts have permitted plaintiffs to recover a defendant’s ill-gotten gains by requiring the disgorgement of profits reasonably created by the defendant’s wrongful conduct. For example, in *State v. Darby*, an issue existed as to whether a court had the authority to disgorge profits under New Jersey’s security laws.⁸⁴ In answering this question in the affirmative, the appellate division recognized that “[t]he authority to order disgorgement of unlawful gains is inherent in the historic equity jurisdiction of the Superior Court, Chancery Division.”⁸⁵

Similarly, in *Platinum Management, Inc. v. Dahms*, the court held that for a claim for intentional interference with economic advantage, a plaintiff may seek to recover those profits reasonably related to the tortious conduct.⁸⁶ It explained that the disgorgement of profits was based upon the policy that “[t]he wrongdoer should not be permitted, by misappropriating an-

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Tull v. United States*, 481 U.S. 412, 424 (1987). See *In re Investors Dev. Co.*, 7 B.R. 772, 775 (Bankr. D.N.J. 1980) (“It is well settled that equity will disgorge an unjust enrichment.”); *Warren v. Century Bankcorporation*, 741 P.2d 846, 852 (Okla. 1987):

The remedy in restitution rests on the ancient principles of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to “disgorge” his gains. Disgorgement is designed to deprive the wrongdoer of *all gains flowing from the wrong rather than to compensate the victim of the fraud.*

⁸⁴ 587 A.2d 1309 (N.J. Super. Ct. App. Div. 1991).

⁸⁵ *Id.* at 1317; see *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 233-34 (N.J. 1952) (holding that the court could order disgorgement of profits under general principles of equity); *Hartman v. Hartle*, 122 A. 615 (N.J. Ch. 1923) (determining that a constructive trust would be created to recover profits from the illegal sale of property); *Marder v. Realty Constr. Co.*, 205 A.2d 744, 745 (N.J. 1964) (observing that a landowner may recover “compensation for some benefit the defendant may have garnered by a wrongful act unattended by depreciation of the value of the strip”).

⁸⁶ 666 A.2d 1028, 1044-1047 (N.J. Super. Ct. Law Div. 1995).

other's opportunity, to use that opportunity in order to help absorb fixed expenses of its own business."⁸⁷

The detriment to the state is the subsurface pollution, which undeniably hurts property rights and property values. The benefit to the defendants is the substantial economic savings on prior pollution, subsequent investigation, and non-cleanup. As a matter of law, it is unjust for defendants to take and retain that benefit.⁸⁸

D. The Role of Unjust Enrichment in Protecting Property Rights

As indicated, unjust enrichment allows a landowner to sue a tortfeasor for a wrongful interference with property rights.⁸⁹ A property⁹⁰ owner may sue when another interferes with the owner's interest in the physical integrity,⁹¹ use and enjoyment, or exclusive possession of his land.⁹² The classic example of the misappropriation of another's land is the case in which the defendant severs fixtures, crops, timber, minerals, earth or other components from the plaintiff's land. When the plaintiff learns of this unlawful taking or trespass and conversion, he sues for the defendant's resultant benefit, and in most cases prevails.⁹³ We can use this situation as a heuristic device to flesh out our thinking about unjust enrichment.

Under the Restatement, the existence of "wrongfulness" is key to the defendant's liability in restitution. Specifically, where the timber is cut willfully or in bad faith, the plaintiff recovers the enhanced value of the trespass without deducting any of the de-

⁸⁷ *Id.* at 1046 (quoting *Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401, 1412 (3rd Cir. 1985)); *see also* *Gillette Co. v. Two Guys from Harrison, Inc.*, 177 A.2d 555, 560 (N.J. 1962) (holding that plaintiff could recover profits derived from violations of the Fair Trade Act to prevent unjust enrichment).

⁸⁸ *See* cases Part I. C. *supra*.

⁸⁹ PALMER, *supra* note 33, § 2.10, at 138 (citing *Edwards v. Lee's Adm'r*, 96 S.W. 2d 1028, 1032 (Ky. Ct. App. 1936)).

⁹⁰ "Property," as used herein refers to interests in land. The rules in land cases may be somewhat different from the rules in personal-property cases.

⁹¹ *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 929 (1977) (if restoration damages disproportionately exceed the diminished value of the land, then damages are limited to that diminution, unless the land is used for a "purpose personal to the owner"). *Id.* at § 929 cmt. b.

⁹² *See, e.g.*, *Exxon Corp. v. Dunn*, 474 So. 2d 1269, 1273 (Fla. Ct. App. 1985) (discussing damages as reduced market value due to nuisance).

⁹³ RESTATEMENT OF RESTITUTION § 129 cmt. d (1937); RESTATEMENT (SECOND) OF RESTITUTION § 45(4) and cmt. i (Tentative Draft No. 2 1984).

fendant's costs.⁹⁴ By way of background, the value of standing trees is usually termed "stumpage value."⁹⁵ The value of that timber after the defendant has engaged in the costly process of cutting it down, removing it, and hauling the wood is called "enhanced value."⁹⁶ Typically, the enhanced value is greater than the stumpage value.

Absent wrongfulness or bad faith, the plaintiff at least will get the stumpage value.⁹⁷ However, bad faith or wrongfulness properly raises the stakes for the tortfeasor, who risks forfeiting all proceeds of the misconduct.⁹⁸ The law consistently treats the intentional tortfeasor or bad-faith actor more harshly. Such actors can and should be deterred.⁹⁹ (This is less likely with inadvertent, mistaken, or emergency-respondent trespassers).¹⁰⁰

E. Federal Analogies

The federal government recognizes the importance of preventing polluters' unjust enrichment. Federal law provides some complementary remedies to recoup unjust enrichment. For example, recovery of economic benefit, plus a penalty that reflects the "gravity" or seriousness of the violation, is the foundation of the Environmental Protection Agency's (EPA's) penalty policy across all environmental statutes.¹⁰¹ The EPA, pursuant to statute-specific programs, has developed individual policies implementing this generic penalty policy. In *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act*, the EPA adjusts the gravity figure by calculating "the economic ben-

⁹⁴ See, e.g., *Masonite Corp. v. Williamson*, 404 So. 2d 565, 568 (Miss. 1981); H.D. Warren, Annotation, *Measure of Damages for Destruction or Injury to Trees and Shrubbery*, 161 A.L.R. 549 (1919); V. Woerner, Annotation, *Right of Trespasser to Credit for Expenditures in Producing, As Against His Liability for Value of, Oil or Minerals*, 21 A.L.R. 2d 380 (1952) [hereinafter *Minerals*]; DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* § 5.3(3) (2d ed. 1993).

⁹⁵ *Masonite*, 404 So. 2d at 568.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See, e.g., *Minerals*, *supra* note 94, at § 5.

¹⁰⁰ *Masonite*, 404 So. 2d at 568.

¹⁰¹ OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, *CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT* (1998), <http://epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf>.

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efit or savings accruing to the violator by the noncompliance.”¹⁰² The purpose of this adjustment is to recapture the economic benefit or savings in order to prevent violators “of environmental laws from having any financial incentive to disregard its legal obligations.”¹⁰³

In order to deter would-be polluters, it is crucial to remove the economic incentives of polluting. Federal courts have almost unanimously recognized the importance of economic benefit in establishing appropriate penalties that deter future violations. The primary area of litigation has been under the Clean Water Act (CWA). For example in *United States v. Municipal Authority of Union Township*, the court specifically recognized that the goal of deterrence requires that a penalty have both an economic-benefit component to ensure that the violator does not profit from its violation of the law, as well as a punitive component to account for the degree of seriousness and/or willfulness of the violations.¹⁰⁴

The court in *United States v. Smithfield Foods, Inc.*, followed the same logic in imposing a penalty of \$12.6 million, the largest environmental civil penalty in history.¹⁰⁵ The economic benefit portion alone was \$4.2 million.¹⁰⁶ The Fourth Circuit Court of Appeals upheld the district court’s approach in calculating the economic-benefit component.¹⁰⁷

State courts also have adopted the federal courts’ treatment of economic benefit. For example, one Connecticut court noted: “First, [a penalty] should include the ‘economic benefit of non-compliance’; otherwise, the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance.”¹⁰⁸

1. Clean Air Act and Clean Water Act

Unjust enrichment is not a penalty at common law because the wrongdoer is only giving back what was unjustly acquired. Thus, no out-of-pocket penalty truly occurs. By contrast, federal law

¹⁰² *Id.* at 16.

¹⁰³ *Id.*

¹⁰⁴ 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff’d* 150 F.3d 259 (3d Cir. 1998).

¹⁰⁵ 972 F. Supp. 338, 352-54 (E.D. Va. 1997).

¹⁰⁶ *Id.* at 349.

¹⁰⁷ *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999).

¹⁰⁸ *Keeney v. Durable Wire, Inc.*, No. CV 91 0399750S, 1995 WL 542161, at *4 (Conn. Super. Ct. Aug. 30, 1995).

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views disgorgement of the economic benefits resulting from non-compliance with environmental laws as a factor (along with the gravity of the violation) in setting penalties. For example, the EPA has interpreted the penalty factors of section 113(e) of the Clean Air Act (CAA) in its CAA Penalty Policy.¹⁰⁹ The policy directs the calculation of two basic components of a penalty, one representing the “economic benefit of noncompliance,” and the other representing the “gravity” of the violation.¹¹⁰

However, the primary area of litigation has been under the CWA. In *Public Interest Research Group of New Jersey, Inc. (P.I.R.G.) v. Magnesium Elektron*, the court determined the economic benefit derived from a CWA violation.¹¹¹ The plaintiff’s expert (Dr. Michael Kavanaugh) calculated the economic benefit as the after-tax present value of the expenditures the company avoided or delayed by not complying with the relevant laws.¹¹² He testified that this is virtually identical to the EPA methodology, and that he uses this methodology when he serves as the federal government’s economic-benefit expert in its CWA enforcement cases.¹¹³ The district court wrote:

Using this methodology, Dr. Kavanaugh determined the economic benefit to defendant of not hauling its wastewater to Trenton from 1984 to 1989 and of not installing and operating an evaporator from 1984 to 1989 In determining the after-tax present value of these expenditures, Dr. Kavanaugh treated the expenditures as either “avoided” or “delayed.” . . . He explained that an avoided expenditure is an expenditure that the company totally avoided by not complying with its Clean Water Act permit, such as expenditures for operation and maintenance or hauling He testified that a delayed expenditure is an expenditure that a company was able to delay but not totally avoid by not coming into compliance with the Act, such as the cost of capital equipment.¹¹⁴

¹⁰⁹ OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, CAA STATIONARY SOURCE CIVIL PENALTY POLICY (1991), available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf>.

¹¹⁰ *Id.*

¹¹¹ No. 89-3193, 1995 WL 461252, at *12-16 (D.N.J. Mar. 9, 1995).

¹¹² *Id.* at *12.

¹¹³ *Id.* at *13.

¹¹⁴ *Id.* at *14. The court additionally explained:

Dr. Kavanaugh explained that he determines the after-tax present value of avoided expenditures by determining the total amount of the expenditures, applying an “opportunity cost” to determine the present value of those expenditures, and subtracting the money which the company would have saved in taxes if it had actually made those expenditures and been able to

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The court accepted the methodology and used it to calculate civil penalties against the defendant, noting that, in regard to the CWA:

The penalty must at least reflect the proven economic benefit. That is the starting point. Then the other § 309(d) factors are used to increase the amount which reflects the economic benefit, except that economic impact of the penalty in extraordinary circumstances may serve to reduce the amount found to reflect the economic benefit to the violator of non-compliance. If the penalty arrived at by calculation of the economic benefit exceeds the statutory maximum penalty, the penalty will be reduced to the statutory maximum.¹¹⁵

Likewise, *P.I.R.G. v. Hercules, Inc.*, involved a penalty assessment by the New Jersey Department of Environmental Protection (NJDEP) for violations under both the CWA and the New Jersey Water Pollution Act (NJWPA).¹¹⁶ The court cited *Weinberger v. Romero-Barcelo*,¹¹⁷ in support of the proposition that, under the CWA, courts have great discretion in assessing penalties.¹¹⁸ That discretion is to be guided by the six factors outlined in the CWA: (1) seriousness of the violations; (2) economic benefits (if any) resulting from the violations; (3) history of such violations; (4) good-faith efforts to comply with the applicable

deduct them from its taxable income He explained that, in order to determine the opportunity cost, he uses an equity rate which reflects how much money the company would have been able to earn on the money it saved as a result of not making those expenditures.

Dr. Kavanaugh explained that he determines the after-tax present value of a delayed expenditure by first determining how much the company would have spent on the expenditure had it made the expenditure on time, i.e., before the violations occurred. . . . In making that determination, he takes into account the expenditures which will be made in the future when the equipment reaches its useful life and is replaced. . . . Once that first determination is made, he determines how much the company spent when it made that expenditure at a later date, i.e., the date when it came into compliance. . . . He makes this calculation in the same way he makes the first calculation except that he uses the later date. . . . Once he has made these calculations of the “on-time” and delayed expenditures, he determines their after-tax present value by applying an opportunity cost and subtracting the tax savings. . . . Finally, he subtracts the after-tax present value of the delayed expenditure from the after-tax present value of the on-time expenditure. . . . That difference is the economic benefit to the company of having delayed the expenditure instead of making it on time.

(citations omitted). *Id.*

¹¹⁵ *Id.* at *16 (internal citations omitted).

¹¹⁶ 970 F. Supp. 363, 364-65 (D.N.J. 1997).

¹¹⁷ 456 U.S. 305 (1982).

¹¹⁸ *Hercules*, 970 F. Supp. at 364.

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requirements; (5) economic impact of the penalty on the violator; and (6) such other matters as justice may require.¹¹⁹ The court noted that it would consider the previous assessment of penalties against the defendant by the NJDEP, given the significant experience and expertise of the NJDEP in the area.¹²⁰ The court also noted that the factors used by the NJDEP in assessing penalties for the defendant's violations of the NJWPA were substantially the same as the six factors to be used under the CWA, stating:

Since this court has no interest in duplicating the efforts of a specialized body such as the NJDEP, it will permit arguments by Hercules that the penalty assessed by the NJDEP was sufficient and should be presumed adequate for the purposes of this court's assessment of a civil penalty under the Clean Water Act.¹²¹

Further, the court declared that a presumption of adequacy would be given to NJDEP's assessment, provided that three factors were met in the decision-making process: "(1) there was a meaningful degree of citizen participation; (2) there is evidence of a careful, individualized determination based on all the relevant facts; and (3) the process resulted in an effective remedy for society sufficient to abate and deter pollution."¹²²

*P.I.R.G. v. Powell Duffryn Terminals, Inc.*¹²³ was another penalty case brought under the CWA. As in *Magnesium Elektron*, the court calculated economic benefit based on the after-tax present value of the expenditures the company avoided or delayed by not complying.¹²⁴ The defendant argued that the district court's calculation of economic benefit was erroneous.¹²⁵ The court of appeals noted that "[p]recise economic benefit to a polluter may be difficult to prove. The Senate Report accompanying the 1987 amendment that added the economic-benefit factor to section 309(d) recognized that a reasonable approximation of economic benefit is sufficient to meet a plaintiff's burden for this factor."¹²⁶ The lower court had calculated economic benefit by using a letter written by the defendant's experts to one of the

¹¹⁹ *Id.* at 364-65 (citing 33 U.S.C.A. § 1319(d) (2005)).

¹²⁰ *Id.* at 365.

¹²¹ *Id.*

¹²² *Id.*

¹²³ 913 F.2d 64 (3d Cir. 1990).

¹²⁴ *Id.* at 79-80.

¹²⁵ *Id.* at 80.

¹²⁶ *Id.*

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defendant's officers that gave the cost of hauling water to a treatment facility.¹²⁷ The court of appeals upheld the district court's estimation of economic benefit.¹²⁸ Interestingly, the district court had lowered the penalty assessed to the defendant by \$1 million because of the EPA's and NJDEP's lack of enforcement action.¹²⁹ The court reasoned that the delay in enforcement was partially responsible for the continued violations.¹³⁰ The court of appeals, however, rejected this argument and ordered the reduction to be removed.¹³¹

Under the CWA,¹³² fines for permit violations are based in part on the estimated amount a polluter has saved by ignoring regulations.¹³³ In fact, agencies often employ cost-benefit comparisons in setting standards to allow resource consumption up to the limit of undue (i.e., "inefficient") societal harm. The trend toward more market-based solutions to environmental problems is evidenced by the EPA's recent "reinvention initiatives"—including Project XL¹³⁴—and outcries for tax incentives and other economic instruments to influence the non-industrial segments of the economy.

2. BEN Computer Model

The "BEN Computer Model"¹³⁵ is an EPA software program which calculates the economic benefit a violator derives from its delay and/or avoidance of compliance with environmental

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 81.

¹³² 33 U.S.C.A. § 1319 (2005).

¹³³ See Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 HARV. ENVTL. L. REV. 95, 100 (2001).

¹³⁴ Project XL is a national EPA pilot program allowing state governments, local governments, businesses and federal facilities to work with the EPA to develop more business-friendly, cost-effective ways of achieving environmental protection. See U.S. Env'tl. Prot. Agency, *What is Project XL?*, <http://www.epa.gov/projectxl/file2.htm>.

¹³⁵ In 1984, the EPA developed a computer program known as the "BEN Model" to assist its staff in calculating the amount of economic benefit for purposes of settlement negotiations. The program requires the agency user to enter data regarding the costs that the company should have incurred to achieve timely compliance, whether in the form of depreciable "capital investments," "one-time non-depreciable expenditures" or "annually recurring costs." The user also must input the date by which the company was required to comply, the date when compliance actually was achieved, and the anticipated penalty payment date.

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laws.¹³⁶ As many laws include the penalty criterion of “economic benefit of noncompliance,”¹³⁷ the BEN Model has been used to calculate penalties under several environmental statutes.¹³⁸

“Economic benefit” is the gain that a violator theoretically receives from delaying or avoiding the costs necessary for environmental compliance.¹³⁹ Many courts use the “cost-avoided” method to calculate economic benefit, which is reflected in the BEN Model promulgated by the EPA.¹⁴⁰ The BEN Model attempts to assess the amount of money that the company expected to earn from its savings in pollution-control costs.¹⁴¹ In both settlement and litigation, the EPA typically insists on recovering the amount of such economic benefit.¹⁴² Otherwise, the EPA argues, companies will have an economic incentive to violate environmental laws.¹⁴³

The BEN Model was based on the premise that financial resources not spent on compliance are available for alternative investments that yield financial returns. The EPA published an explanation of this computer model, which states in part:

The BEN Model converts the inputted costs to their present value using a discount/compound rate based upon the company’s weighted-average cost of capital, while also taking into account prevailing tax and inflation rates. The model then compares the on-time compliance scenario (what the company should have incurred to achieve timely compliance) with the delay compliance scenario (what the company in fact spent to achieve compliance). The difference is the company’s alleged economic benefit.

If the case goes to trial, the EPA typically relies upon expert witnesses, rather than the BEN Model, to prove a company’s economic benefit. *See Calculation of the Economic Benefit of Noncompliance in EPA’s Civil Penalty Enforcement Cases* 64 Fed. Reg. 32,948, 32,949 (June 18, 1999) [hereinafter *1999 BEN Notice*]. However, the approaches used by these experts often are very similar to the BEN Model’s methodology. There is sharp disagreement among economists regarding whether or not the BEN Model tends to overstate the amount of economic benefit received.

¹³⁶ See *1999 BEN Notice*, *supra* note 135, at 32,948-49.

¹³⁷ See, e.g., OFFICE OF ENFORCEMENT AND COMPLIANCE INSURANCE, *supra* note 101.

¹³⁸ See *1999 BEN Notice*, *supra* note 135, at 32,949.

¹³⁹ See *id.* at 32,948.

¹⁴⁰ It appears that the model adopted by the New Jersey courts closely resembles the BEN Model. See *Public Interest Research Group of New Jersey, Inc. (PIRG) v. Magnesium Elektron*, No. 89-3193, 1995 WL 461252 (D.N.J. Mar. 9, 1995); *PIRG v. Hercules, Inc.*, 970 F. Supp. 363 (D. N.J. 1997); *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990).

¹⁴¹ See *1999 BEN Notice*, *supra* note 135, at 32,949.

¹⁴² See *id.*

¹⁴³ See *id.*

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If these financial resources are not used for compliance, then they presumably are invested in projects with an expected direct economic benefit to the organization. This concept of alternative investment—that is, the amount the violator would normally expect to make by not investing in pollution control—is the basis for calculating economic benefit of noncompliance. . . . In the absence of enforcement and appropriate penalties, it is usually in an organization's best economic interest to delay the commitment of funds for compliance . . . and to avoid certain associated costs, such as operation and maintenance expenses.¹⁴⁴

¹⁴⁴ 1999 BEN Notice, *supra* note 135, at 32,949. Further, the User's Guide to the BEN Model explains:

BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures. Such expenditures can include: (1) Capital investments (*e.g.*, pollution control equipment), (2) One-time nondepreciable expenditures (*e.g.*, setting up a reporting system, or acquiring land), (3) Annually recurring costs (*e.g.*, operating and maintenance costs). Each of these expenditures can be either delayed or avoided. BEN's baseline assumption is that capital investments and one-time nondepreciable expenditures are merely delayed over the period of noncompliance, whereas annual costs are avoided entirely over this period. BEN does allow you, however, to analyze any combination of delayed and avoided expenditures. The economic benefit calculation must incorporate the economic concept of the "time value of money." Stated simply, a dollar today is worth more than a dollar tomorrow, because you can invest today's dollar to start earning a return immediately. Thus, the further in the future the dollar is, the less it is worth in "present-value" terms. Similarly, the greater the time value of money (*i.e.*, the greater the "discount" or "compound" rate used to derive the present value), the lower the present value of future costs. To calculate a violator's economic benefit, BEN uses standard financial cash flow and net present value analysis techniques, based on modern and generally accepted financial principles. First, BEN calculates the costs of complying on-time and of complying late, adjusted for inflation and tax deductibility. To compare the on-time and delayed compliance costs in a common measure, BEN calculates the present value of both streams of costs, or "cash flows," as of the date of initial noncompliance. BEN derives these values by discounting the annual cash flows at an average of the cost of capital throughout this time period. BEN can then subtract the delayed case present value from the on-time case present value to determine the initial economic benefit as of the noncompliance date. Finally, BEN compounds this initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance. A violator may gain illegal competitive advantages in addition to the usual benefits of noncompliance. These may be substantial benefits, but they are beyond the capability of BEN or any computer program to assess. Instead BEN asks you a series of questions about possible illegal competitive advantages so that you may identify cases where they are relevant.

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Considerable guidance on penalty assessment comes from section 309(d) of the CWA,¹⁴⁵ which calls for consideration of the following factors in determining the amount of any civil penalty:

- (a) the seriousness of the violation or violations;
- (b) the economic benefit (if any) resulting from the violation;
- (c) any history of such violations;
- (d) any good faith efforts to comply with the applicable requirements;
- (e) the economic impact of the penalty on the violator; and
- (f) such other matters as justice requires.

Courts vary in how they apply these factors. Some use a “top-down” method, starting with the statutory maximum penalty, and using the six factors to adjust downward.¹⁴⁶ The government favors this approach. Other courts use a “bottom-up” approach, first ascertaining the economic benefit of non-compliance, then adjusting upward or downward using the other five factors to arrive at an appropriate penalty.¹⁴⁷ “Because the statute does not prescribe either method, it appears that a court is free to use its discretion in choosing the appropriate method.”¹⁴⁸

These examples demonstrate the public-policy goal of preventing a polluter’s unjust enrichment. The goals of environmental legislation are deterrence and prevention. This is because environments cannot be “completely” returned to their pre-pollution state. Where the federal government falls short in preventing unjust enrichment, the tort system can pick up the slack.

F. Classic Issues

In order to bring a claim for unjust enrichment, a plaintiff’s detriment need not represent a direct confiscation by the tortfeasor. It is enough to make a claim that the tortfeasor has used the plaintiff’s property without consent, even if the use is not incompatible with the plaintiff’s current use. For example, say that a plaintiff has some vacant land being held on spec for a

¹⁴⁵ 33 U.S.C.A. § 1319(d) (2005).

¹⁴⁶ See *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) (holding that the “top-down” method is the most appropriate means of assessing penalties).

¹⁴⁷ See *United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 265 (3d. Cir. 1998); *United States v. Gulf Park Water Co., Inc.*, 14 F. Supp. 2d 854, 858 (S.D. Miss. 1998).

¹⁴⁸ *Union Twp.*, 150 F.3d at 265 (citing *United States v. Smithfield Foods*, 972 F. Supp. 338, 354 (E.D. Va. 1997)).

long-term development. The defendant parks some equipment there from time to time in lieu of paying for storage at a public facility. Under this sort of scenario, it is sufficient to show that the defendant received an economic benefit. The retention of that benefit must result in an unjust enrichment at the plaintiff's expense.¹⁴⁹ Difficulty in ascertaining the amount of enrichment has been raised as a complete defense, but rejected by the Supreme Court.¹⁵⁰

1. Measuring the Defendant's Benefit

Unjust enrichment also provides a simpler avenue for proving damages in the context of environmental and toxic torts. The amount of money saved, or economic benefit received, for example, by not installing pollution-control equipment and adequately disposing of waste is sometimes more readily ascertainable than the harm suffered by victims of pollution. In *Hawaii's Thousand Friends v. City & County of Honolulu*, the court measured the economic benefit the county achieved by not complying with proper waste disposal by stating:

There are two components to the calculation of economic benefit: (1) the benefit that the city received from delayed capital spending (i.e., money saved by delay in issuing and making payments on general obligation bonds to finance the construction of the required pollution control equipment); and (2) the operating and maintenance ("O & M") expenses for the pollution control equipment that the city avoided operating during the period compliance was delayed. The economic benefit can be quantified by comparing the present value of the costs of complying on time with the costs of complying late. If the costs of complying late are less than the costs of complying as required by law, the city has enjoyed a positive economic benefit.¹⁵¹

Given the difficulty of proving a speculative loss such as interference, use and enjoyment, or stigma, and given also that unjust enrichment provides a more certain amount, it is not hard to see why the civil justice system would benefit from allowing the plaintiff to choose his remedy in appropriate cases.

¹⁴⁹ RESTATEMENT (THIRD) OF RESTITUTION § 1(a) (Discussion Draft 2000).

¹⁵⁰ *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931).

¹⁵¹ *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1387 (D. Haw. 1993).

2. *When is the Defendant's Retention of Benefit Unjust?*

A plaintiff-to-defendant transfer that lacks an adequate legal basis for the transfer is unjust.¹⁵² Transfers without an adequate legal basis that give rise to unjust enrichment claims are nonconsensual transfers where the transferee improperly obtains a benefit. "Transactions in which a benefit is obtained by wrongdoing generally involve a form of taking without asking; the resulting transfer is nonconsensual because the defendant has neglected a duty to contract with the owner for the property or its use."¹⁵³

These enrichments can be direct or indirect. A tortfeasor is directly enriched by gaining something from the retention or the taking. For example, a defendant who sells lumber from trees severed from a neighbor's property is directly enriched. This is the classic understanding of unjust enrichment.

Indirect enrichments, or savings, are especially significant in property-pollution cases. A defendant often saves money by polluting a neighbor's property. This savings is often above and beyond the damages actually done to the now-polluted property. The storage of hazardous wastes, in accordance with EPA guidelines, is very expensive.¹⁵⁴ A polluter can avoid these costs by releasing the waste onto a neighbor's property. The polluter still retains a benefit even after compensating the landowner for the full value of the land. This is clearly an instance of indirect unjust enrichment.

The law recognizes indirect enrichment as falling within the scope of unjust enrichment by equating restitution with the disgorgement of the indirect enrichment. When a defendant receives a net gain by acting in a way that disregards the plaintiff's rights, the entire gain is treated as an unjust enrichment. This is the case even where "the defendant's gain may exceed both [1] the measurable injury to the plaintiff, and [2] the reasonable value of a license authorizing the defendant's conduct."¹⁵⁵

3. *Plaintiff's Expense*

The unjust enrichment must occur at the expense of the plaintiff. This does not necessitate that the defendant acted wrongly or that the plaintiff suffered an injury equal to the enrichment.

¹⁵² RESTATEMENT (THIRD) OF RESTITUTION § 3(a) (Discussion Draft 2000).

¹⁵³ *Id.*

¹⁵⁴ See *supra* text accompanying note 4.

¹⁵⁵ RESTATEMENT (THIRD) OF RESTITUTION § 3 cmt. b (Discussion Draft 2000).

Rather, an unjust enrichment occurs at the plaintiff's expense when the defendant receives a benefit from the plaintiff that would be unjust for the defendant to retain without compensating the plaintiff.¹⁵⁶

G. Pollution Cases: Relation of the Plaintiff's Harm to the Defendant's Benefit

A person "who has been unjustly enriched at the expense of another" is required to make restitution to the other.¹⁵⁷ Restitution of unjust enrichment restores money or property taken either by mistake or with intent.¹⁵⁸ Use-value, such as interest or rent, of the thing taken is also part of restoration. Thus, restitution is essentially restoration. It is not a form of action, but a description of the relief afforded.¹⁵⁹

Restitution of unjust enrichment thus restores either the thing taken or lost, or the benefit that has been gained by the taking (disgorgement). Whether an enrichment is unjust depends on whether "the defendant has received benefits that in equity and good conscience it ought not to keep."¹⁶⁰ Generally, good conscience is offended when one is allowed to enrich himself unjustly at the expense of another.¹⁶¹ Many claims for unjust enrichment fail because the petitioners fail to identify both the benefit and the retention. As discussed *infra*, the "expense of another" need be neither an out-of-pocket loss nor a harm equal to the tortfeasor's benefit.

The first question raised by the bad-faith polluter is whether the foregoing "trespass and conversion" line of cases is properly analogous. The polluter would prefer to draw the analogy to cases involving trespass without conversion, also known as the "bare use" cases.¹⁶² Some contend that the violation of a landowner's property rights without any other physical or economic damage is not recoverable in damages (although injunctions to prevent the infringement of that right remain). "Bare use" is another way of saying "no harm, no foul."

¹⁵⁶ *Zuger v. N.D. Ins. Guar. Ass'n.*, 494 N.W. 2d 135, 138 (N.D. 1992).

¹⁵⁷ RESTATEMENT OF RESTITUTION § 1 (1936).

¹⁵⁸ DOBBS, *supra* note 11, § 4.1, at 222.

¹⁵⁹ *Id.*

¹⁶⁰ *Baker & Markoff, supra* note 53, at 115.

¹⁶¹ *See Callano v. Oakwood Park Home Corp.*, 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966).

¹⁶² *See, e.g., Edwards v. Lee's Adm'r.*, 96 S.W.2d 1028, 1030 (Ky. Ct. App. 1936).

Pollution cases are more like trespass and conversion than bare-use cases. First, there is a loss. The victimized landowner suffers economically in the form of lost property values, lost opportunities, lost economic development for the affected area, and stigma.¹⁶³ Second, intentional misconduct or bad-faith actions (even in a bare-use case) lead to a disgorgement result regardless of loss. This must be addressed to deter the wrongful conduct.¹⁶⁴

The classic illustration of this latter point is provided by *Edwards v. Lee's Administrator*¹⁶⁵ and the Restatement of Restitution.¹⁶⁶ In *Edwards*, the surface lands overlying a cave were owned by the plaintiff and defendant.¹⁶⁷ The surface line between their respective properties bisected the area above the cave, but only the defendant had access to the cave.¹⁶⁸ The defendant opened the entire cave as a tourist attraction and charged admission, and the plaintiff filed a claim that the defendant was wrongfully profiting from his land.¹⁶⁹ The defendant responded by claiming that the plaintiff's property was not in any way being injured by the use, and indeed, was restored to its original condition from a separate and earlier injunction.¹⁷⁰ In addition, the defendant contended that the cave was of no practical use to the plaintiff, as it could only be entered through the defendant's land.¹⁷¹ The Kentucky Court of Appeals rejected these claims, holding that, as a knowing trespasser, the defendant was accountable for "the benefits, or net profits, received by [him] from the use of the property of the [plaintiff]."¹⁷²

Initially, the court observed that the ordinary recovery for an action for trespass was the reasonable rental value of the property.¹⁷³ After reviewing several theories of recovery, including

¹⁶³ *Branch v. Mobil Oil Corp.*, 788 F. Supp. 539 (W.D. Okla. 1992).

¹⁶⁴ This is especially true where there were reasonable alternatives available to the defendant that would have avoided or minimized injury to the plaintiff class. See *Rose v. Chaiken*, 453 A.2d 1378, 1381-82 (N.J. Super. Ct. Ch. Div. 1982) ("the availability of alternative means of achieving the defendant's objective has been found to be relevant").

¹⁶⁵ *Edwards*, 96 S.W.2d. at 1028.

¹⁶⁶ See RESTATEMENT (SECOND) OF RESTITUTION § 46 cmt. c, illus. 3 (Tentative Draft 1983-84).

¹⁶⁷ *Edwards*, 96 S.W.2d. at 1028-29.

¹⁶⁸ *Id.* at 1029.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1030.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1032.

¹⁷³ *Id.* at 1030.

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that found in the final draft of the Restatement of Restitution and Unjust Enrichment, part I, section 136, the court concluded that “the measure of recovery . . . must be the benefits, or net profits, received by the . . . use of the property.”¹⁷⁴ The underlying philosophy of the cases discussed by the court was “that a wrongdoer shall not be permitted to make a profit from his own wrong.”¹⁷⁵ Thus, under the appropriate circumstances, a plaintiff may recover the profits created by a tortfeasor’s impermissible use and enjoyment of his land.¹⁷⁶

At that time, allowing a plaintiff to sue for the defendant’s profit from the land use, while no resources were removed, was in opposition to the view expressed in the English case of *Phillips v. Hamfray*, which disallowed any restitutionary claims in bare-use cases.¹⁷⁷ Nevertheless, *Edwards* was hailed as a “welcome departure” from the traditional view.¹⁷⁸ Since then, American courts have almost unanimously condemned the traditional view as anachronistic and have either disapproved it or ignored it altogether.¹⁷⁹ Furthermore, the proposed draft Restatement rejects the traditional view.¹⁸⁰ Even England has repudiated it.¹⁸¹

The American Law Institute’s draft Restatement of Restitution and Unjust Enrichment includes situations sounding in tort, like that in *Edwards*. For example, in the 2000 Discussion Draft concerning general principles, the American Law Institute re-

¹⁷⁴ *Id.* at 1032.

¹⁷⁵ *Id.*

¹⁷⁶ See also *Nat’l Merch. Corp. v. Leyden*, 348 N.E. 2d 771, 774-76 (Mass. 1976) (stating that the remedy for unfair competition includes disgorgement of profits because the tortfeasor should not be permitted to speculate that profits may exceed the injured party’s losses, thereby encouraging commission of the tort by allowing defendants to retain part of the illegal gains).

¹⁷⁷ *Phillips v. Hamfray*, [1883] 24 Ch. 439 (appeal taken from P.).

¹⁷⁸ See RESTATEMENT OF RESTITUTION, Reporter’s Notes § 129 cmt. at 194-95 (1936). *Edwards v. Lee’s Administrator* demonstrated that the law of torts and the law of restitution have common ground: tort law identifies those circumstances in which a person is liable for the infliction of a non-consensual harm, measuring liability by the extent of the harm to the plaintiff. The law of restitution identifies those circumstances in which a person is liable for a non-consensual benefit received, measuring liability by the extent of the benefit.

¹⁷⁹ See, e.g., *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 236-38 (Va. 1946); *Monarch Accounting Supplies Inc. v. Prezioso*, 368 A.2d 6, 10 (Conn. 1976); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 593-94 (5th Cir. 1957); PALMER, *supra* note 33, § 2.5, at 77-80.

¹⁸⁰ RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. b, illus. 5 (Tentative Draft 2000).

¹⁸¹ Her Majesty’s Stationery Office, *Aggravated, Exemplary and Restitutionary Damages*, Law Commission Report No. 132 160 (1993).

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porter gave the following illustration of a restitution remedy stemming from tort:

A repeatedly and intentionally trespasses on B's land, avoiding the higher costs of transportation by an alternate route and hoping to avoid paying B for a license. A's saved expenditure (the net costs avoided or the price of a license, whichever is higher) is an unjustified enrichment because it is the result of a legal wrong. More specifically, A's enrichment is the product of A's conscious neglect of the duty to contract with B for the use of B's property. A is liable to B in restitution in the amount of A's saved expenditure, whether or not A's repeated trespass has caused any injury to B's land.¹⁸²

The reporter cites the foregoing example from *Raven Red Ash Coal Co. v. Ball*.¹⁸³ The cautionary note is that B's right of recovery is dependant upon B's property interest in the land invaded by A. In most groundwater pollution cases, the polluter contaminates the state-owned water table below the plaintiff's property, as to which surface owners (1) have an undeniable right of use, and (2) draw water that is hydrologically interconnected to the contaminated water.¹⁸⁴

Additional case law imposes the equitable remedy of unjust enrichment to compensate the impermissible use of land. In *N.C. Corff Partnership, Inc. v. Oxy USA, Inc.*, the plaintiff sued a neighboring operator of oil and gas wells after elevated levels of toxic chemicals were discovered in the groundwater.¹⁸⁵ Unjust enrichment was among the plaintiff's claims.¹⁸⁶ The court recognized that under Oklahoma law:

A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . [It] arises not only where the expenditure by one person adds to the property of another, *but also where the expenditure saves the other from expense of loss*.¹⁸⁷

The court stated that, in order to recover for unjust enrichment, the plaintiffs "must prove not only that . . . [the defendant]

¹⁸² RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. b, illus. 5 (Tentative Draft 2000).

¹⁸³ *Raven Red Ash Coal Co.*, 39 S.E.2d at 231.

¹⁸⁴ *See id.*

¹⁸⁵ *N.C. Corff P'ship, Inc. v. Oxy USA, Inc.*, 929 P.2d 288 (Okla. App. Ct. 1996).

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* at 295 (quoting 66 AM. JUR. 2D *Restitution and Implied Contracts* § 3 (1973) (emphasis added)).

is responsible for contaminating the property, but also that the contamination will not be abated, and that . . . [the defendant] in fact has received an economic benefit thereby.”¹⁸⁸

In *Beck v. Northern Natural Gas Co.*, the plaintiff sued for trespass and unjust enrichment after natural gas migrated from the defendant’s subsurface storage formation into a formation below the plaintiff’s property.¹⁸⁹ The Tenth Circuit upheld the jury’s finding that the company was unjustly enriched by its use of the additional storage space below the plaintiff’s property.¹⁹⁰ Specifically, it found the company was unjustly enriched by its increased ability to store natural gas and sell it during periods of peak demand, and that the use-value for the gas space below the plaintiff’s property was worth at least \$12 million.¹⁹¹ While decided under a specific Kansas statute concerning the migration of natural gas beneath property, *Beck* nonetheless illustrates the reasonableness of a recovery in restitution for the value of the underground storage space.¹⁹²

H. The Remedy or Choice of Remedies in Pollution Cases for the Savings or Benefit Conferred

Edwards tells us two distinct things: First, as indicated above, wrongful or bad-faith torts (even in bare-use cases) are actiona-

¹⁸⁸ *N.C. Corff*, 929 P.2d at 295; *see also* *Moore v. Texaco, Inc.*, 244 F.3d 1229, 1233 (10th Cir. 2001) (explaining that “performance of another’s statutory duty to remediate pollution can give rise to a claim for unjust enrichment”).

¹⁸⁹ 170 F.3d 1018, 1021 (10th Cir. 1999).

¹⁹⁰ *See id.* at 1023.

¹⁹¹ *Id.* at 1022-23.

¹⁹² An important issue before the court was whether the plaintiff could recover damages for both the trespass and the unjust enrichment claim. *Id.* at 1024. The court held that the plaintiff was limited to one recovery for one wrong, and that the remedy was the same for both claims. *Id.* The court phrased the remedy in the language of unjust enrichment, stating that, “[t]he *benefit* that Northern received from the landowners was the use of the . . . formation without payment of rent, for which proper measure of damages was . . . fair rental value” *Id.* (emphasis added). The case demonstrates the confusing nature of this issue. The damages received were clearly restitution. But was the restitution awarded for the unjust enrichment claim or for the trespass claim? The court seems to be saying that this remedy is available for both. This denies the conventional wisdom that for a tort, such as trespass, only the more traditional compensatory damages are allowed. Clearly, the damages here were not compensatory because the plaintiff’s only injury was the invasion of a property right. The damages were measured by “the benefit that Northern received,” not by injury to the plaintiff, which could not be determined with clarity. *Id.* However, because there was also an unjust enrichment claim, it cannot be said that this case sets any clear precedent.

ble. Second, the proper remedy is disgorgement of profits or benefits (e.g., enhanced value, not stumpage value), and not just fair-rental value.¹⁹³

As previously indicated, to recover under the unjust-enrichment doctrine, the plaintiff must show that the defendant received a benefit and that the retention of that benefit without payment would be unjust. The concept of a “conferred benefit” is construed broadly:

A person confers a benefit upon another if he . . . satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word “benefit,” therefore, denotes any form of advantage.¹⁹⁴

Courts recognize money saved as the basis for an unjust-enrichment case.¹⁹⁵ This savings is also referred to as negative unjust enrichment or recoverable profit.¹⁹⁶

In pollution cases, the unjust-benefit claim is that the polluter improperly benefited (1) by polluting rather than spending to control its pollution by properly disposing of its waste, and (2) by later refusing to spend to clean the resulting mess thoroughly. In *Branch*, unjust enrichment was predicated on the money saved by the defendant through its wrongful conduct in the specific context of pollution.¹⁹⁷

In *Branch*, the defendant Atlantic Richfield Co. sought to dismiss the plaintiff's complaint for failure to join indispensable parties.¹⁹⁸ In denying the defendant's request, the court discussed the nature of the plaintiff's claims:

The Court agrees with Plaintiffs that the alleged conduct of Defendants which Plaintiffs claim unjustly enriched Defendants is delictual rather than contractual in nature. The conduct is expressly alleged to be negligence and negligence per se. As a remedy for such alleged conduct, Plaintiffs seek disgorgement of gains flowing from Defendants' alleged wrongdoing, in the form of money saved by Defendants by not

¹⁹³ See *supra* text accompanying notes 167-76.

¹⁹⁴ RESTATEMENT OF RESTITUTION § 1 cmt. b (1936).

¹⁹⁵ See *Tilghman*, 125 U.S. 136, 146 (1888); *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 894, 933 (10th Cir. 1975); *Cross v. Berg Lumber Co.*, 7 P.3d 922, 936 (Wyo. 2000).

¹⁹⁶ See *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35, 36 (W.D. Okla. 1991).

¹⁹⁷ *Branch*, 778 F. Supp. 35, at 36.

¹⁹⁸ *Branch v. Mobil Oil Corp.*, 788 F. Supp. 539, 539-40 (W.D. Okla. 1992).

complying with state law and Oklahoma Corporation Commission rules and regulations. Disgorgement is a restitutionary remedy or remedy for restitution. The underlying basis for disgorgement and other restitutionary remedies or tools like quasi-contracts is the prevention of unjust enrichment. "Restitution may be sought in contract actions, tort actions, statutory actions and others."¹⁹⁹

If a polluter is allowed to store hazardous waste on or under another's property, he or she benefits because the scenario is less expensive than alternatives, such as sending the waste to a properly-permitted landfill. The defendant was enriched to the extent it conducted its activities while avoiding the costs associated with eliminating the resulting harms. These costs are ultimately borne by the state.²⁰⁰ Examples of unjust enrichment include situations in which the means or ends of the polluter's conduct are improper. Here, the defendants, in order to effectuate a savings for themselves, used the others' public or private property as a de facto waste disposal site without prior consent or payment for that privilege.²⁰¹

The ability to disgorge money unjustly saved by a polluter's wrongful actions was similarly recognized in *Evans v. City of Johnstown*²⁰² and *Cassinovs v. Union Oil Co.*²⁰³ Disgorgement of profits is an accepted remedy in equity to prevent unjust enrichment.²⁰⁴ Thus, recovery in implied-contract actions has been

¹⁹⁹ *Id.* at 540 (internal citations omitted).

²⁰⁰ *U.S. v. Healy Tibbitts Const. Co.*, 607 F. Supp. 540, 542-43 (N.D. Cal. 1985) ("The portrait of a polluter indifferently standing idle while its oil spill is neutralized at public expense—and thereafter spiritedly disavowing any responsibility for recompensing the United States—offers as compelling an example of unjust enrichment as has lately been brought before the Court.").

²⁰¹ *Branch*, 778 F. Supp. at 35; see also *DOBBS*, *supra* note 11, § 4.5, at 278; see also *Tilghman v. Proctor*, 125 U.S. 136, 146 (1888); *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946).

²⁰² 410 N.Y.S.2d 199, 206-07 (N.Y. 1978) (holding that plaintiff could proceed on a claim of unjust enrichment against defendant municipalities for money they saved by not properly disposing of waste materials).

²⁰³ 18 Cal. Rptr. 2d 574, 584-85 (Cal. Ct. App. 1993) (noting that the fair market cost to dispose of injected wastewater at available sites in the area during the pertinent period was a reasonable quasi-contractual measure of damages for the defendant property owner's trespass through injection of off-site wastewater into plaintiff's adjacent property, damaging plaintiff's mineral estate).

²⁰⁴ See *In re Investors Dev.*, 7 B.R. 772, 775 (Bankr. D. N.J. 1980) ("It is well settled that equity will disgorge an unjust enrichment."); see also JAMES FISCHER, *UNDERSTANDING REMEDIES* 303 (1999) ("The essence of unjust enrichment and its correlative remedy of restitution is the recovery of the benefit realized by the defendant not the harm or injury sustained by the plaintiff.").

measured by the value of the defendant's benefit, rather than the amount of the plaintiff's loss.²⁰⁵

II

UNJUST RETENTION

A benefit is unjustly retained if it is not obtained by consent or paid for by the recipient under a contract—here, the polluter who has taken and continues to profit from a de facto pollution easement. The unjust enrichment remedy in tort seems especially strong where the tortfeasor has intentionally enriched himself through a wrong against the plaintiff.²⁰⁶ The fact that the tortious conduct involves pollution, and a de facto taking of a pollution easement relative to one's neighbors, only strengthens the case for a disgorgement remedy.²⁰⁷

The notion of unjust retention is supported by basic economics. The state and/or neighbors of the polluters bear the burdens of pollution—an externality²⁰⁸—the cost of which has not heretofore been borne fully by the polluting party. From an economic

²⁰⁵ See *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford*, 677 A.2d 747, 753 (N.J. 1996) (stating that a contract action implied in law is similar to restitutionary claim, and that recovery is measured "by the amount the defendant has benefited from the plaintiff's performance"); *Marder v. Realty Constr. Co.*, 205 A.2d 744, 745 (N.J. 1964) (observing that a landowner could recover against a trespasser for "compensation for some benefit" despite no depreciation in value of land); see also *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 237 (Va. 1946) (stating that a person who illegally uses another's land, but does not cause diminution in land value, is still responsible for preventing unjust enrichment under an implied-contract theory because he received a substantial benefit as a result of his own conduct).

²⁰⁶ RESTATEMENT OF RESTITUTION §§ 150-57 at 202-05 (1936); accord, *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 1032 (Ky. Ct. App. 1936).

²⁰⁷ In commercial cases and contracts, the analysis may be different. The concept of efficient breach suggests that a party should not be punished merely for failing to honor a contractual promise because breach may be an economically efficient choice for a party willing to pay the damages caused by the breach.

²⁰⁸ Alfred C. Pigou (1877-1959) formally elaborated on how costs and benefits that are not included in the polluter's market prices affect how people interrelate with their environment. An externality is a phenomenon that is external to markets and, hence, does not affect how markets operate when in fact it should. See A.C. PIGOU, *THE ECONOMICS OF WELFARE* (1920). Some of the early environmental economists who expressly called for internalizing the costs of production and the previously externalized costs of pollution include J. DALES, *POLLUTION, PROPERTY, AND PRICES: AN ESSAY IN POLICY-MAKING AND ECONOMICS* (1968); A. KNEESE, R. AYERS, & R. D'ARGE, *ECONOMICS AND THE ENVIRONMENT* 1-15 (1970). Scholars who have addressed this issue in the legal context include WILLIAM W. LANDES and RICHARD A. POSNER, *THE STRUCTURE OF TORT LAW* 29-31 (1987); Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 271 (1989).

point of view,²⁰⁹ the polluter has been unjustly enriched by: (1) invading the fundamental private property rights of its neighbors without consent or compensation,²¹⁰ (2) undermining the public interest in a clean environment, and (3) gaining an improper and illegal competitive edge against its competitors. Pollution harms property rights and honest competitors, and so the law makes the polluter pay to avoid unjust retention.

In an ideal scenario, a polluter and its neighbors negotiate openly. As noted earlier, where such negotiation is impossible because of the covert (if not fraudulent) conduct of the polluter, the law, in the exercise of equity, implies a contract between the parties.²¹¹

A. Tort Remedies Create Imperfect and Special Circumstances Necessitating Equitable Relief

Traditionally, the tort remedy for property damage has been either restoration or the market value of the property.²¹² In the case of pollution, neither remedy is always adequate, and thus there is a need for equitable remedies, whether under a tort or equitable cause of action.

If an actor intentionally pollutes and/or refuses to restore the damaged environment, what happens to the neighboring landowner? If his property is worth \$300,000, what is the remedy? If the polluter only pays \$300,000 or some lesser amount as FMV, there is a de facto taking, in whole or in part, without consent or public necessity. In effect, the polluter pays the government rate under its limited constitutional privilege to take private property. Clearly, this result makes no sense.²¹³ Moreover, it is difficult to value the pollution easement without a real (i.e., voluntary) market for the same. If the property or the interest in property (i.e., the pollution easement) has no real market value at the time and

²⁰⁹ Restoration is the most efficient remedy for damage to publicly owned natural resources. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 194 (3rd ed. 1986) (stating that restitution has an appropriate place in intentional tort cases because it makes “the tort worthless to the tortfeasor and thereby channel[s] resource allocation through the market”).

²¹⁰ Typically, polluters never ask the relevant environmental authority to condemn all or part of the affected property because they are unable to show the constitutionally required public need and they are unwilling to pay just compensation.

²¹¹ See, e.g., *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35, 35 (W.D. Okla. 1991); *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 S.2d 475, 483 (La. 1991).

²¹² RESTATEMENT (SECOND) OF TORTS § 929 (1977).

²¹³ See, e.g., *Magnolia Coal Terminal*, 576 So. 2d at 484.

place of the conversion because its nature creates no general demand, a FMV approach makes little or no sense.²¹⁴ Finally, it seems grossly inequitable and conducive to lawless behavior for a polluter to knowingly avoid paying, say, \$1 million in disposal or storage charges in return for a \$300,000 involuntary payment to his neighbor after extensive and costly litigation.

The alternative remedy at law of restoration damages is important, but arguably is not always adequate by itself. The law often requires a showing of special need to invoke the restitutionary remedy,²¹⁵ and this, if interpreted too stringently, is difficult to show in many cases. The restoration cost often is greater than the FMV. While this is in itself not objectionable, it may still allow a measure of unjust enrichment in certain cases. Moreover, laws and regulations that expressly reserve all state law claims in tort and equity often result in minimal cleanup. Since regulators worry more about imminent and substantial endangerments to health and the environment, a second cleanup is rarely inconsistent with the same, or with a collateral attack on the government-approved remediation.²¹⁶

B. The Connection Between the Wrong and the Enrichment

The simple unjust enrichment case involves the defendant enriching himself by taking the plaintiff's property. In that case, the property needs to be returned. As in the camera hypothetical, a similar case involves the wrongful taking of property and its subsequent sale for more than it is worth, necessitating a substitutionary remedy. In pollution cases, the storage or taking of a pollution easement can be equated to the tortfeasor's saving of disposal and cleanup costs.

There are less obvious cases, in which the connection between the wrongdoer's enrichment and plaintiff's property is not as direct. A direct connection is not vital, such as where the defendant knowingly sells a defamatory story about the plaintiff. The tortfeasor is enriched at the victim's expense, but not by transfer-

²¹⁴ The wronged landholder may then waive the tort and proceed upon an implied contract of sale to the wrongdoer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrongdoer by the owner. *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929).

²¹⁵ RESTATEMENT (SECOND) TORTS § 929 cmt. c (1977).

²¹⁶ See *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1315 (N.D. Fla. 2001).

ring wealth or property. No one doubts the plaintiff may recover under an unjust-enrichment theory.²¹⁷

Likewise in *Edwards*, the defendant's profits came from charging admission to access both the cave under his property (which he had improved for that purpose) and the otherwise inaccessible portion of the cave under the plaintiff's property.²¹⁸ There was no "taking" from the plaintiff in the traditional sense. Nevertheless, the plaintiff recovered that money on an unjust-enrichment basis in tort.²¹⁹

III

PUBLIC TRUSTEE SUITS FOR UNJUST ENRICHMENT

A. *Restitution to the Public Trust*

States and Indian tribes, vested with authority to act as natural resource trustees, can also bring claims for unjust enrichment. A state's unjust enrichment claim arises where a party improperly benefits by polluting instead of spending to control its waste streams, properly dispose of its waste, and clean up the resulting mess. In essence, the defendants have been enriched by conducting their activities, while simultaneously avoiding the costs associated with eliminating harms. These costs are ultimately borne by the state, as defendants use state property as a de facto waste disposal site.

In *Wyandotte Transport Company v. United States*, the Supreme Court held that restitution was an allowable remedy for government, even though statutory penalties already applied.²²⁰ In *Wyandotte*, the government sued for the negligent sinking of a ship in a navigable river.²²¹ The case can be considered a toxic tort because the sunken vessel contained chlorine.²²² The court allowed the government to be reimbursed for the expenses of raising the ship and any cleanup involved, because statutory fines were "hardly a satisfactory remedy for the pecuniary injury

²¹⁷ Other examples would be "when a trademark or copyright owner, having suffered no damage, recovers some or all of an infringer's profits; or when the victim of an embezzler recovers the appreciated value of the property in which his money was invested." Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1193 (1995).

²¹⁸ *Edwards v. Lee's Adm'r*, 96 S.W. 2d 1028, 1028-29 (Ky. Ct. App. 1936).

²¹⁹ *Id.* at 1031.

²²⁰ *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 200-01 (1967).

²²¹ *Id.* at 193.

²²² *Id.* at 194.

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which the negligent shipowner may inflict upon the sovereign.”²²³ The court further added, “[d]enial of such a remedy . . . would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim.”²²⁴

Analysis of this result offers two possible explanations. First, the government recovered on a claim of unjust enrichment because the defendant would otherwise have been unjustly enriched by passing the expense of raising the sunken vessel to the government. To be analyzed in unjust enrichment, there must be an involuntary transfer, like a mistaken payment. In *Wyandotte*, the fact that the government was statutorily required to pay for the cleanup of the sunken vessel meant that the defendant was unjustly enriched. Indeed, the Tenth Circuit has squarely held that the “performance of another’s statutory duty to remediate pollution can give rise to a claim for unjust enrichment.”²²⁵

A second explanation for the *Wyandotte* result is that the government, having proved its suit in tort for negligence, was given a restitutionary remedy. This seems to be the more plausible analysis because the government was required to prove the different elements of a tort, but was awarded restitution instead of the more typical award of compensatory damages.²²⁶ In contrast to a tort claim, an unjust enrichment claim requires no proof of “wrong” or fault, only proof of an involuntary transfer.²²⁷

In deciding the case, the court relied heavily on the Restatement of Restitution section 115, which states:

A person who has performed the duty of another by supplying things or services, although acting without the other’s knowledge or consent, is entitled to restitution from the other if (a) he acted unofficiously and with intent to charge therefore, and (b) the things or services supplied were immediately necessary

²²³ *Id.* at 202.

²²⁴ *Id.* at 204.

²²⁵ *Moore v. Texaco, Inc.*, 244 F.3d 1229, 1233 (10th Cir. 2001).

²²⁶ *Wyandotte*, 389 U.S. at 205. .

²²⁷ BIRKS, *supra* note 13, at 41, explains that claims in unjust enrichment can be analyzed through a sequence of five questions: (i) Was the defendant enriched? (ii) If so, was that enrichment at the expense of the claimant? (iii) If so, was there any ‘unjust factor’, i.e., any circumstance recognized as requiring restitution? (iv) If so, what kind of restitutionary right arose from that unjust enrichment at the claimant’s expense? (v) Does the enricher have any defense which will reduce or extinguish his liability?

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to satisfy the requirements of public decency, health, or safety.²²⁸

This demonstrates the court's understandable confusion over the workings of unjust-enrichment claims. If the claim were truly such, only the elements of unjust enrichment, or those in the Restatement, would have to be proven, not negligence.

Congress has expressed a preference for disgorging money saved by polluters. For instance, Congress established that penalties for noncompliance with laws governing air quality can be set at a level "no less than the economic value which a delay in compliance . . . may have for the owner of the source [of pollution]."²²⁹

Similarly, in *United States v. Smithfield Foods, Inc.*, the court stated, "[v]iolators [of the CWA] should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws."²³⁰ In that case, the economic benefit was \$4.2 million.²³¹ In upholding the district court's economic benefit calculation, the Fourth Circuit Court of Appeals stated, "[t]he rationale for including this measure as part of the violators' fine is to remove or neutralize the economic incentive to violate environmental regulations."²³² Consequently, the wrongdoer would not enrich himself, and the common burdens to judicial resolution would be bypassed.

B. Other Public Trust Claims

Unjust enrichment is only one of many theories available to the government. For example, in an NRD case, a state may sue under the state common law public trust doctrine or federal Superfund law for restoration damages as well as loss-of-use

²²⁸ RESTATEMENT OF RESTITUTION § 115 (1936).

²²⁹ 42 U.S.C.A. § 7420(d)(2)(A)(2005).

²³⁰ *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 348 (E.D. Va. 1997) (quoting *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, at 80 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)).

²³¹ *See id.* at 349.

²³² *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999) (quoting *United States v. Mun. Auth. Union Twp.*, 150 F.3d 259, 264 (3d Cir. 1998)); *see also*, *Keeney v. Durable Wire, Inc.*, No. CV 91 0399750S, 1995 WL 342161 (Conn. Super. Ct. Aug. 3, 1995) (holding a penalty should include the economic benefit of non-compliance; otherwise, the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance).

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damages associated with the injured resource.²³³ In addition, states may seek unjust enrichment as a remedy for the associated trespass. As a practical matter, full compensation does not also permit a double recovery. However, it is unclear what to do when the cost of restoration plus the cost of loss of use exceeds the amount of the unjust enrichment. *Wyandotte* only touches on the issue without resolving it.²³⁴

For example, if a polluter saved \$1 million by polluting public waters rather than paying for proper disposal, and if the court awards the trustee \$2 million for restoration and loss of use, would a further award for the unjust-enrichment claim be a double recovery? No court has addressed the issue. However, given the same facts, if restoration and loss-of-use damages totaled \$200,000, a further award of \$800,000 does not appear problematic. But this invites the question of whether unjust enrichment should be viewed as a type of offset or stand-alone claim. If it is not an offset, and nothing in the jurisprudence suggests that it is so limited, then there would be no double-recovery problem.

CONCLUSION

A long line of precedent supports the use of unjust enrichment in cases analogous to property-pollution cases. These precedents make clear three fundamental principles: (1) a party who receives an economic benefit by trespassing on and using the property of another must pay the owner for profits received from the use of the land;²³⁵ (2) the right to recover unjust enrichment is separate from the right to recover damages; and (3) the right to recover does not depend upon whether property damage has occurred or whether the plaintiff would have received the benefit.²³⁶ Unjust enrichment may be remedied by money damages in

²³³ Allan Kanner, *Tribal Sovereignty and Natural Resource Damages*, 25 PUB. LAND & RESOURCES L. REV. 93, 94-95 (2004).

²³⁴ See *Wyandotte Trans. Co. v. United States*, 289 U.S. 191 (1967).

²³⁵ RESTATEMENT OF TORTS § 929 cmt. b (1939); RESTATEMENT OF RESTITUTION §§ 129, 151, 157 (1936); *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 1031 (Ky. Ct. App. 1936) (defendant profited from cave under the plaintiff's property); *Quality Excelsior Coal Co. v. Reeves*, 177 S.W.2d 728 732(Ark. 1944) (subsurface trespass); *Mederacke v. Becker*, 205 N.E.2d 519 (Ill. App. Ct. 1965); *Marder v. Realty Constr. Co.*, 205 A.2d 744, 745 (N.J. 1964).

²³⁶ *Edwards*, 96 S.W.2d at 1031; *Quality Excelsior Coal*, 177 S.W.2d at 732; *Shell Petroleum Corp. v. Shully*, 71 F.2d 772, 775 (5th Cir. 1934); *Marder*, 205 A.2d at 745; *Don v. Trojan Constr. Co.*, 2 Cal. Rptr. 626, 627 (Cal. Dist. Ct. App. 1960).

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an action for restitution at law or by injunctive relief (e.g., creation of a constructive trust) at equity.²³⁷

The expanding body of case law on unjust-enrichment claims is a natural outgrowth of the common law of torts. As such, it should be regarded by property-owner plaintiffs as a reasonable and effective means of challenging polluters as well as people who extract some form of profit from their unauthorized use of the plaintiff's land or resources. The courts generally have been responsive to these claims where they have been appropriately raised and where any alternative claims were either unavailable or not sufficiently responsive to the harm suffered by the landowner.²³⁸

Calculating the damages in these claims is a demanding task requiring the court to consider various factors and possibilities. Disgorgement of profits, fair rental value, recovery of economic benefit or the land's lost value, and punitive damages are all sources of damages for the plaintiff. Both economic benefit and punitive damages present complicated calculations that the federal government has approached reasonably with the BEN Model and other expert calculations. These calculation methodologies should be considered by plaintiffs seeking to maximize recovery in unjust-enrichment claims.

²³⁷ See PALMER, *supra* note 33, §1.1, at 2-6. Unjust enrichment has been recognized by the Supreme Court in many contexts, including attorney fees. In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970), a shareholder derivative suit, the Court stated: "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses, would be to enrich the others unjustly at the plaintiff's expense." Similarly, in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), a shareholder class action, the Court stated that the common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense."

²³⁸ At least one court states that to satisfy the requirements of raising a federal claim of unjust enrichment, the language of the applicable statute must first be carefully considered. In fact, that court appears to have commingled statutory law and equity in a unique analysis. Applying the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Northern District of Oklahoma in *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1310-11 (N.D. Okla. 2003), *vac'd pursuant to settlement* (July 16, 2003), found that when the City of Tulsa sued several poultry businesses for polluting the city's reservoirs with their wastewater, the city itself had unclean hands and could only seek contribution from the businesses for their share of the cleanup costs. Thus, although the businesses were enriched by their use of the reservoirs and by avoiding the cleanup, the claim of unjust enrichment was not available to the city, although other claims survived.

